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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. ~~917~~ 85

JOHN F. WADE, MRS. CHARLES CURRAN, Executrix of the Estate of Charles Curran, as individuals and as partners under the name of Wade, Curran & Co., *Petitioners,*

vs.

UNION CARBIDE AND CARBON CORPORATION, UNITED STATES VANADIUM CORPORATION, ELECTRO METALLURGICAL COMPANY, ELECTRO METTALURGICAL SALES CORPORATION, ELECTROMETALLURGICAL COMPANY OF CANADA, LTD., and VANADIUM CORPORATION OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals

for the Tenth Circuit entered in the above entitled case on December 27, 1961.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not as yet reported. A copy of the opinion is attached hereto as Appendix A. No opinions were issued by the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 27, 1961 (R. 4, Appendix B.) Petitioners did not file a Petition for a Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court should grant this Petition in view of the fact that it raises the identical issue presented in *Continental Ore Company, et al. v. Union Carbide and Carbon Corporation, et al.*, No. 304, certiorari granted October 23, 1961, in the same industry, involving the same actors, but with a variation of the factual situation with respect to alleged authorization from a sovereign to violate the antitrust laws.

2. Are conspirators having the purpose and intention of monopolizing an industry and eliminating all competition liable under the antitrust laws for causing the finan-

cial destruction of a competitor resulting in his elimination from an industry where, although his property rights are purchased by the Manhattan District for governmental use, the evidence is substantial that his property rights would not have been sold to or acquired by the Manhattan District but for the prior impact of the conspiracy on the financial condition of the competitor.

3. Whether or not the use of a governmental agency to administer the final blow to an injured competitor who had sustained his injury by reason of a combination between admitted monopolists predicated upon non-governmental acts gives immunity under the antitrust laws.

4. Whether the elimination of a substantial competitor by a combination of private acts and acts performed pursuant to governmental decision absolves acknowledged conspirators from civil liability under the anti-trust laws.

5. Whether a private company which is authorized to act in a governmental capacity escapes liability under the antitrust laws or is allowed judicial exemption from the antitrust laws for actions which it pursues for the purpose of eliminating competition and achieving a monopoly pursuant to an admitted conspiracy to monopolize.

6. Whether petitioners can be deprived of their judgment of $600,000 (after verdict by jury) on the Appellate Court's "finding" that the final, but by no means total, predatory means to eliminate petitioners from a lucrative industry were carried out pursuant to "direction" from a government agent (who admittedly was completely dependent upon the two private companies controlling 100% of the market) and petitioners' property is thereafter turned

over to one of the monopolists (which made exorbitant profits from its vanadium and uraniuin ore), all in the face of the Appellate Court's acknowledgment:

(a) that the two monopolists controlled the industry pursuant to a deliberate (and successful) comprehensive scheme to dominate the total industry;

(b) that petitioners were the intended victims along with many other independents of respondents' scheme to monopolize the industry;

(c) that private acts, amounting to antitrust violations without government involvement, weakened petitioners to the point where the final blow (at the alleged "direction" of the government) might have been ineffectual to deprive petitioners of their properties;

(d) that the "government" in this case was actually a wholly owned subsidiary of Union Carbide, acquiring properties containing uranium at the "direction" of an army officer who admittedly was "just a geologist" without any knowledge of the Colorado plateau; and

(e) that the elimination of petitioners was accomplished pursuant to an admitted plan of respondents "to keep these claims from becoming the nucleus for the maintenance of a vanadium mill operated by outsiders" to the conspiracy.

7. Whether petitioners, who were awarded a jury verdict in the amount of $200,000 before trebling were deprived of a trial by jury by the Appellate Court below which reversed the jury verdict by weighing the evidence,

making factual rulings on the sufficiency of evidence of causation, not viewing the evidence as a whole, not allowing petitioners the benefit of all their evidence, not allowing petitioners the benefit of all inferences and presumptions to be drawn from the evidence, and not resolving all conflicts in the evidence in favor of petitioners in direct conflict with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 4 of the Clayton Act, 15 U.S.C. §15. These are printed and attached to this Petition as Appendix C, The antitrust exemption provisions of the Small Business Mobilization Act, June 11, 1942, C. 404, § 12, 56 Stat. 351 are attached hereto as Appendix D.

STATEMENT OF THE CASE

A. SUMMARY STATEMENT

This was one of five actions filed by various plaintiffs in the United States District Court for the District of Utah to recover treble damages under the anti-trust laws.

Petitioners herein were experienced mining operators and pioneers in the vanadium-uranium business. They were established miners and potential millers of vanadium products. (Pl. Ex. 118, R. 1308; Pl. Ex. 119, R. 1310.) Mr. Charles Curran, a graduate mining engineer, was originally in the group that operated United States Vanadium Company, which was eventually purchased by Union Carbide,

one of the respondents herein. (Pl. Ex. 119; R. 1296; 1311-1316.) Mr. John F. Wade operated a trading post in New Mexico (Pl. Ex. 124; R. 1324.) Mr. Thomas F. V. Curran was a metallurgist from Pittsburgh and an experienced businessman. (Pl. Ex. 119; R. 1310.) The Curran Brothers were dead at the time of the trial.

Petitioners claimed that they were driven out of the vanadium business and forced to sell valuable mining claims on the Colorado Plateau for grossly inadequate consideration by reason of respondents' violations of the antitrust laws. They claimed that they were victims of an overall conspiracy to monopolize the vanadium industry and that this conspiracy eliminated them from their business as miners, developers and potential millers of vanadium products. (R. 239-240.)

The defendants-respondents are the same as those involved in the case now pending before this Honorable Court in *Continental Ore Company, et al. v. Union Carbide and Carbon Corporation, Vanadium Corporation of America, et al.*, October Term, 1961, No. 304. The conspiracy to monopolize the vanadium industry involved here is the same conspiracy to monopolize involved in the said *Continental Ore* case.

Briefly stated, then, this case involved the inability of John F. Wade, Charles Curran and Thomas F. V. Curran, to remain in the vanadium business as a successful mining venture and expectant milling venture after developing and operating valuable vanadium-uranium mining claims during the period 1940 to 1944 on Navajo Council lands in Arizona.

The true value of their discovery and explorations, involving more than 168 square miles of land in the Carrizo mountains and valuable uranium potentials was never known to Wade and the Currans. The discoveries of the petitioners in this mountain area were made known to employees of USV who did know their uranium values. USV in exchange for $4,000 became a ⅓ partner with Wade and Curran on a 168 square mile exploration lease which was reduced to a 900 acre mineral right lease. The remaining one-third was acquired by Union Mines Development Corporation, a wholly owned subsidiary of Union Carbide. Union Mines then transferred the entire interests in the leases to the Manhattan District for their uranium values. The petitioners were paid $12,500 (in addition to the $4,000), but the properties involved were rich in terms of uranium as well as vanadium values. Since 1948, respondent VCA has extracted over $600,000 in uranium from these lands. (R. 1402.) The general testimony to the Wade and Curran action is set forth at R. 1289-1458; 1521-1581; 1581-1633; 1655-1678.

There was substantial evidence that the financial weakening of petitioners was the direct result of respondents' wrongful acts committed pursuant to the common objective of eliminating the Wade and Curran mining ventures from competition, as others were to be eliminated. That the Manhattan District allowed Union Mines to explore for promising uranium land and to purchase uranium lands as "free market" buyers became a significant factor in the manner in which the elimination of Wade and Curran occurred. But the substantial evidence was that the uranium properties of financially strong parties such as

respondents were not acquired by the Manhattan District and the Manhattan District clearly did not sponsor or know of the respondents' combination and purpose to gain and maintain a monopoly control over the Colorado Plateau. The respondents took the defense of governmental direction and presented evidence of their contracts and relations with the Manhattan District to the jury. The trial Court rendered appropriate conspiracy to monopolize instructions. (R. 3177-3202.) The jury found that petitioners had been injured as a proximate result of respondents' conspiracy to monopolize the vanadium industry and awarded petitioners the sum of $200,000. (R. 299-300.) The learned Court below, while sustaining other judgments, reversed the judgment entered in the above action on the jury verdict.

B. THE TRIAL AND APPEAL

Five separate actions were filed against respondents in the Utah District Court by persons who claimed they were injured by respondents' overall conspiracy to monopolize every phase of the vanadium industry. The five actions filed against respondents were:

1. *Frank J. Nisley, Jr., et al. v. Union Carbide and Carbon Corporation, et al.*, hereinafter referred to as the *Nisley* action. This action involved an independent mill which claimed that it was eliminated from the vanadium industry by respondents' conspiracy to monopolize the complete vanadium industry.

2. *Louis C. Ackermann v. Union Carbide & Carbon Corporation, et al.*, hereinafter referred to as the *Acker-*

mium action. This action involved another independent mill which claimed that it was eliminated from the vanadium industry by this same conspiracy.

3. *Continental Ore Company v. Union Carbide & Carbon Corporation, et al.*, which involved distributors and agents in the alloy metals business who alleged that they were eliminated from the vanadium industry by the same conspiracy.

4. *Howard A. Balsley, et al. v. Union Carbide and Carbon Corporation, et al.* This case was filed by 36 individual miners who mined and sold carnotite ore containing both vanadium and uranium to respondents. These individuals prospected, located and mined claims containing the valuable ore on the Colorado Plateau and otherwise sold vanadium-uranium ores to respondents. In their action they claimed that they were injured as a result of respondents' conspiracy which, as one of its facets, involved the fixing of the prices paid to these miners for the ore they sold respondents.

In addition, in this action, as Count Two of their Complaint, these 36 individual miners filed a class action on behalf of the class of miners similarly situated.

5. *John F. Wade, et al. v. Union Carbide & Carbon Corporation*, the case with which we are concerned in this Petition. This case is known as the *Wade and Curran* case.

Proceedings in the *Continental Ore* case were stayed by order of the Tenth Circuit because this company had filed a similar action in the United States District Court for the Northern Division of California, Southern District.

The California case resulted in a jury verdict in favor of respondents. The judgment entered on said verdict was affirmed by the Ninth Circuit Court of Appeals. *Continental Ore Co. v. Union Carbide and Carbon Corp.* (9 Cir. 1961), 289 F. 2d 86. This Court granted certiorari on October 23, 1961, limiting the certiorari to certain specific issues. One of these issues was whether these same respondents, as part of this same overall conspiracy to eliminate all competition from the vanadium industry, could utilize a wholly owned Canadian subsidiary which had been given a discretionary power by the Canadian government to allocate the importation of vanadium into Canada during the war to exclude the Continental Ore Company from the Canadian market and prevent it from shipping its products to its Canadian customers.

That issue is almost identical to one of the principal questions involved in this case. While the *Continental Ore* case involved the use of a Canadian governmental agency to further respondents' conspiratorial and monopolistic purposes, the instant case involves the use of an American governmental agency power to exclude another vanadium business.

The remaining four Utah District Court actions were consolidated for trial before a jury. After a six-week trial in which voluminous evidence was introduced, the jury returned unanimous verdicts in favor of plaintiffs in the *Nisley* action (R. 215); in favor of defendants in the *Ackermann* action; in favor of the individually named plaintiffs in Count One of the *Balsley* action (R. 409-410); and in favor of the plaintiff class in Count Two of the *Balsley* action. (R. 408.)

The complaint herein was filed on June 2, 1958. (R. 241.) The trial on the four consolidated cases commenced on November 2, 1959. The jury returned its verdicts on December 12, 1959. The transcript covered 4,500 pages. The trial lasted six weeks. In the consolidated trials, plaintiffs, one of them being petitioners herein, introduced 264 exhibits and respondents introduced 230 exhibits. As stated above, on December 12, 1959, the jury returned a verdict in favor of petitioners in the sum of $200,000. This was trebled by the Court and judgment was entered thereon on December 18, 1959. (R. 299-300.)

Respondents appealed from the judgments in the *Nisley* action, the *Wade and Curran* action and the *Balsley* action. They also received permission from the Tenth Circuit to file an Interlocutory appeal from an order entered after the verdict for the class in the *Balsley* class action. Mr. Ackermann, who had retired to Europe prior to the trial, did not appeal the adverse judgment against him.

On appeal, on December 27, 1961, the Tenth Circuit expressly and specifically found that there was an overall conspiracy to monopolize the vanadium industry and to exclude all competition by respondents. It substantially affirmed the *Balsley* action, the *Nisley* action and the Class Action. However, it reversed the judgment in favor of Petitioners. (See Opinion, Appendix A.)

Petitions for a Rehearing were filed by respondents in the *Balsley, Nisley* and Class Actions. Petitioners herein did not file a Petition for Rehearing in the Tenth Circuit in the *Wade and Curran* case. The Petitions for Rehearing filed by respondents in the *Balsley, Nisley* and Class Actions have not yet been ruled on by the Tenth Circuit.

In reversing the jury verdict and judgment in favor of Petitioners *(Wade and Curran)*, the Tenth Circuit ruled that the acquisition of the *Wade and Curran* properties was directed by the United States Government. It found that whereas in the *Nisley* action, the respondent-conspirators possessed and were conclusively found to have taken advantage of their position as governmental agents to their wrongful ends, in the *Wade and Curran* case respondents, although found to be confessed conspirators and violators of the antitrust laws by the Appellate Court, lacked the power to commit the acts of which they were accused by petitioners because of the "positive intervention" of government action. In reaching this different result in the two cases, this Court stated that in the *Nisley* case respondents, as governmental agents, had "discretion" in their activities and the power to "enfeeble" intended victims, while in the case at bar, this "enfeebling" and the predatory acts which led to petitioners' loss of valuable claims were the result of "positive intervention of governmental action".

In its opinion, the Court of Appeals for the Tenth Circuit agreed with the jury that an overall conspiracy to monopolize existed in the vanadium industry and found that respondents did conspire to monopolize the vanadium industry at all its levels, did conspire to eliminate independent mills, such as the Nisley mill, and did conspire to fix prices as part of that overall conspiracy.

C. EVIDENCE OF CONSPIRACY TO MONOPOLIZE

(1) INTRODUCTION

To fully understand the *Wade and Curran* case and the manner in which petitioners were injured by the overall conspiracy to monopolize which the jury and the Court below found to be a fact it will be necessary to set forth the statement of the overall conspiracy. We deem it necessary to present the statement of the overall conspiracy because the acts which injured petitioners herein constituted but a phase of the overall conspiracy.

(2) CONTROL OF THE VANADIUM INDUSTRY

At all times relevant here, respondents controlled the mining, manufacture, and sale of vanadium ore, vanadium oxide and ferrovanadium, every individual phase of the vanadium industry.

(a) Ferrovanadium

Respondents produced and sold almost 100% of the ferrovanadium in the United States during the period 1938-1958. (Pl. Ex. 9, 10; R. 583-584; Pl. Ex. 160; R. 1454.) The only competitor to respondents in the sale of ferrovanadium was the Continental Ore Corporation for a short period from 1940 to 1942, but it also was eliminated as a competitor. (Pl. Exs. 79-82; R. 1167-1170.) Although during the period 1938 to 1945 Union Carbide produced approximately 77% of the domestic vanadium oxide from which ferrovanadium is produced (Pl. Ex. 4; R. 578); it was its principal competitor, VCA, which sold approximately two-thirds of the finished product, ferrovanadium (Pl. Ex. 5, 10, 160; R. 579, 584, 1455).

Prices for ferrovanadium, the finished product, have always been uniform for each company during the period 1934 to 1958. From 1934 to 1947 they were $2.70, $2.80 and $2.90. Thereafter there were uniform increases. As late as October 1, 1956 the prices for both companies were uniformly increased to $3.20 and $3.30 and $3.40. (Pl. Ex. 10, 12.)

Ninety-nine percent of all the ferrovanadium contracts in the steel industry, which is the prime user of ferrovanadium, were based on requirement contracts with respondents, either on a 100% basis or a shared percentage. (R. 1703?) This automatically excluded dealing with any other firm during the contract period.

(b) Vanadium Oxide

Respondents controlled over 90% of the vanadium oxide produced in the United States. (Pl. Ex. 3, 4, 5; R. 576-579.) Respondents' mills on the Colorado Plateau accounted for over 90% of the domestic production of vanadium oxide. (Pl. Ex. 3; R. 576-578.) At various times, small independent mills attempted to start an operation on the Colorado Plateau but they were systematically eliminated by respondents, so that by 1944 respondents were the only producers of vanadium oxide on the Colorado Plateau. (Pl. Ex. 3, 4.) At the consolidated trials, plaintiffs produced substantial evidence that these independent mills were unable to operate because respondents, as part of their conspiracy to monopolize the entire vanadium industry, deliberately sought to and successfully did eliminate them as competitive vanadium oxide millers or producers. (R. 674-676; 714-719.)

Even the production of those who produced vanadium oxide only as a by-product was purchased by Union Carbide specifically "to keep it off the market". (Burwell R. 664-669.)

Domestic prices for vanadium oxide by each respondent have been uniformly $1.10 per pound of V_2O_5 until 1947. After 1947, prices were adopted by respondents as follows (Pl. Ex. 11, 12; R. 584: per pound V_2O_5):

Union Carbide		VCA	
(Contract prices—any quantity)		(Contract prices—any quantity)	
10/ 1/47	$1.20		$1.20
10/ 1/48	1.20	1/ 1/48	1.20
(Contract less than carload)			
11/10/50	1.28	11/15/50	1.28
		(Ton lots, less than ton lots)	
10/ 1/55	1.33	10/ 1/55	1.33
10/ 1/56	1.38	10/ 1/56	1.38

(c) Vanadium Ore

Approximately 91% of all the combined ore milled by respondents came from their own properties. (Pl. Ex. 255, 256; R. 2740-1; USV 91%; VCA 70%.)

Ore prices paid to miners have been substantially identical for both respondents. Both respondents adopted an identical price based on 2% vanadium content. (R. 641-644.)

During the period October, 1938 to June, 1942, the price paid the miners was 21 cents a pound for 2% ore. (Pl. Ex. 25; R. 589-91; Pl. Ex. 47; R. 1007.)

After June, 1942, respondents paid the miners 31 cents a pound for 2% ore. (Id.)

The miners had no dependable alternative markets for the sale of the average grade of carnotite ore which they mined on the Colorado Plateau. Vitro Company, through its agent, Howard Balsley, was buying *only* some high grade carnotite ore, 15% U_3O_8, 5% V_2O_5, which was used for ceramic purposes. (R. 2589; Pl. Ex. 118, 200; R. 1308, 1922.) The few independent oxide mills that were started to give the miners a possible competitive outlet were eventually eliminated from competition by respondents, as will be pointed out in detail hereinafter. And when the opportunity arose for the independent miners to acquire the Durango and Monticello Mills after the war, these were acquired by respondents specifically to prevent independent operators from acquiring them. (Pl. Ex. 13; R. 585; Pl. Ex. 14; R. 585; Pl. Ex. 136; R. 1357; Pl. Ex. 137; R. 1358; Pl. Ex. 36; R. 709-710.)

(d). Uranium—By-Product of Vanadium

As a necessary result of the control of the oxide mills, respondents were also in control of the Colorado Plateau and its uranium potential during the war and until the Atomic Energy Commission started its successful guarantee program in or about March, 1951. (VCA-20, R. 2011; and see R. 1731-1735.)

Physically and chemically the vanadium industry encompassed the element uranium, since the carnotite ore found on the Colorado Plateau contained both elements. The two elements are contained in the same ore. Vanadium cannot be treated or discussed without considering uranium. The raw ore could be milled for vanadium content or its uranium content or both. Thus, the conspiracy to control and dominate the vanadium industry by respond-

ents necessarily included a control of uranium as well. The record shows that respondents' exclusionary conspiracy resulted in almost total ownership and control by respondents of the principal carnotite ore deposits on the Colorado Plateau, the mills producing the oxide from the ore and the sale of the finished ferrovanadium. As a result of their experience in the milling and treatment of carnotite ores, respondents were called upon by the Government to produce uranium oxides, erect uranium mills, and acquire carnotite properties for the war effort. (UC 4, R. 772; UC 5, R. 775; R. 1812-1813; UC 17, R. 797; R. 796-817.) Respondents however utilized this national emergency to further the existing conspiracy and to acquire control of the "rich prize, one of the greatest mineral resources of all time", the "trickle of money" that "would become a river of money later on". (Burwell R. 616.)

Because of their position in the dawn of the uranium era during the period 1938 to 1948, respondents became the basic private contractors in the development of uranium. Respondents' control of the uranium industry was a continuation of the existing conspiracy and a necessary result of the primary control of the milling of vanadium oxide.

(3) REVIEW OF THE EVIDENCE

(a) Genesis of Conspiracy to Monopolize

Prior to 1927, VCA was the dominant producer of vanadium in the world, securing all its vanadium ore supply from a mine in Peru. (R. 600.)

Union Carbide entered the vanadium business in 1927 when it acquired the mining operations of the United States Vanadium Company, which was producing vanadium oxide at Rifle, Colorado. (R. 598.) The mining installations of this company had been designed and installed by Blair Burwell.[1] (R. 598.) Burwell was employed as mining engineer by USV and placed in charge of all the company's mining operations on the Colorado Plateau. (R. 598-599.) Prior to this time, neither Union Carbide nor any of its subsidiaries had been in the vanadium business. (R. 599.)

Union Carbide wholly owned the stock of USV and treated it as a division or unit of the large Carbide family. Union Carbide serviced these units and tightly con-

[1]Without any doubt Blair Burwell was the most informed man on vanadium and uranium in the Colorado Plateau. He was Union Carbide's principal managing agent on the Colorado Plateau and there are few transactions mentioned in this brief in which he was not the prime actor and controlling influence. He was vice-president of Union Carbide's subsidiary, U.S.V.; a Director of U.S.V.; Assistant to the Vice President in Charge of U.S.V.'s mining operations; an Engineer whose specialty was radium, vanadium and uranium; a Consultant for the Atomic Energy Commission; the Appraiser for the United States on the Colorado Plateau for the valuation of vanadium lands; Vice-President of Union Mines Development Corp.; he conducted special studies, surveys and appraisals of mineral resources in the United States for Union Carbide; a Director of the Metal Mining Fund of the State of Colorado; a writer of technical texts on mining; Chairman of the Board of Mineral Engineering Co.; Director of the Climax Uranium Co. He has been actively engaged in mining on the Colorado Plateau since 1919. (R. 594-595, 603.) For his extensive experience in uranium see R. 731-733.

trolled their budgets. (R. 603-605, 2117.) Carbide's directors or officers determined the basic policy of these units. (Id. and R. 687-694.)

Union Carbide's decision to enter the vanadium field was reached only after a thorough investigation of the vanadium situation conducted at the request of its top executive officers. (R. 599-603.) Prior to his employment by Carbide's USV, Burwell had been consulted as to the nature, quantity and quality of ore deposits on the Colorado Plateau and their ability to supply sufficient vanadium to justify Union Carbide's entering the vanadium business and developing the uses of vanadium as an alloy metal. (R. 599-601.) Mr. Van Fleet of USV was sent on a secret mission to Peru to inspect VCA's Peruvian mine in order to determine VCA's Peruvian ore reserves and the mine's ability to produce sufficient vanadium to supply the then anticipated needs for vanadium in the growing engineering steel market. (R. 600-601.) Burwell reported that the Colorado Plateau ore deposits were more than sufficient to support a domestic vanadium production. (R. 600.) Van Fleet reported that within a period of five years VCA's Peruvian ore would not be able to compete price-wise with Colorado Plateau ore because the depletion of the Peruvian mine's high grade ores would bring about increased production costs. (R. 600-603.) Based on these reports, Union Carbide authorized Burwell to purchase extensive vanadium properties on the Plateau and Union Carbide entered the vanadium industry in 1927. (R. 602.)

The reason Union Carbide entered the vanadium business in 1927 was that Union Carbide anticipated that the

price of ferrovanadium could be lowered and that both vanadium oxide and ferrovanadium could be produced from domestic ores at a profit, so as to make vanadium a major engineering alloy in Carbide's family of products, support a successful independent vanadium business and compete effectively with other alloy metals. (R. 600-603.) Instead of proceeding with this policy, Union Carbide entered into a conspiratorial agreement with VCA whereby VCA would be allowed to remain in the vanadium field as a controlled competitor, and together they would monopolize the entire field. (R. 606.)

The price of vanadium was not cut, as originally contemplated, so as to take VCA's market because an agreement between VCA and Carbide Electromet had been made to maintain the price of vanadium oxide and ferrovanadium. (Burwell R. 606-615.)[2] The agreement made between the two respondents provided that VCA was to be established as the competitor of Electromet in the ferrochrome business in order to forestall possible antitrust action which might come up in the future if Electromet were the only producer of the ferrochrome. (Burwell R.

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[2]Burwell testified that ". . . it had been decided not to cut the price of vanadium and take the markets because such action would put the Vanadium Corporation out of business." (R. 606.) "I to my satisfaction, to the best of my knowledge, knew that there was an agreement between the Vanadium Corporation of America and the United States Electro Metallurgical Company which restricted . . ." (R. 611.) ": . . we were well aware at that time we were restricted in our sales in this country." (R. 610.) "We couldn't [reduce the price of vanadium] because there was an agreement between these two companies, to the best of my knowledge, that prevented us from reducing the price of vanadium and ferrovanadium and we continued to sell vanadium oxide to the Vanadium Corporation of America. Instead of cutting the price on our huge output to stimulate production in Colorado . . ." (R. 614-615.)

672-673.) In return for being set up as a controlled competitor in ferrochrome, VCA was to be allowed to maintain its vanadium markets and set the price for vanadium without price cutting or competition by the Union Carbide group of companies. (Burwell R. 673; 682-683.)[3] Therefore, the price of vanadium was not cut. Union Carbide "didn't want the Vanadium Corporation put out of business for reasons of connections that had been made with Vanadium Corporation in regard to the sales of low-carbon ferrochrome." (Burwell R. 606.)

Consequently, pursuant to this conspiracy, the oxide produced by USV at Rifle was not sold in the market in accordance with the "policy understanding of 1927" but instead it was stored at Rifle. (R. 606.)

At this time, VCA was still entirely dependent on its Peruvian mine for all its vanadium ore and USV was the sole producer of vanadium from domestic ore.

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[3]Burwell testified that "[Gormely] told me that Vanadium Corporation of America had been established as a friendly competitor to sell low carbon ferrochrome in the United States, and the reason for that was to forestall antitrust action that might come in the future. That was on the advice of the attorneys at the time." (R. 672-673.) ". . . they had decided to set up the Vanadium Corporation as a competitor of low carbon ferrochrome, and they had, therefore, made the arrangements with the Vanadium Corporation of America, for them to resell low-carbon ferrochrome and, therefore, avoid any questions about the Electro Metallurgical Company being the sole producer of the low-carbon ferrochrome . . . Vanadium Corporation . . . requested in return for their being established as a reseller of low-carbon ferrochrome that they would not be disturbed or put in competition by the low cost vanadium of the United States Vanadium Corporation, and that they would then have all the vanadium, that they would set the market, make the price, and that the United States Vanadium Corporation, Electro Metallurgical Company, and Electro Metallurgical Sales would not cut the price of vanadium to the point that had been contemplated before. And they did." (R. 682-683.)

Instead of competing with each other, VCA and Union Carbide entered collusive arrangements whereby, in 1933, Union Carbide supplied its "competitor" VCA with 1,000,000 pounds of vanadium oxide at 30 cents below the market price. (Pl. Ex. 6, contract dated September 15, 1933, Burwell. R. 579-580; 613.) In addition, commencing in 1933, the top executive officers of the Union Carbide group of companies discussed entering into negotiations for a single joint operation with VCA at Naturita. Thereafter, meetings were held between VCA and USV officers relating to the purchase of claims, costs, production, sources of ore and the VCA mill. (Pl. Exs. 26, R. 620; 54, R. 1078; 55, R. 1082; 56, R. 1085; 57, 1089; 58, R. 1090; 59, R. 1090; 60, 1091.)

Direct documentary evidence, of the type seldom if ever found in anti-trust cases, was introduced at the trial demonstrating the intimate cooperation and working arrangements between VCA and the Union Carbide group of companies, fully corroborating Burwell. For example:

Pl. 26: A letter dated December 22, 1933, from Mr. Burwell to his superior, Mr. Van Fleet, which provides in part:

"Following our last discussion on the matter in which you brought up the question of the adaptability of the Vanadium Corporation of America to an enlarged scheme of operation, it has seemed to me necessary that we should bring our ideas together to decide what will be the most economical and up to date plant of a large capacity, in its treatment features, and if we can fit the Vanadium Corporation plant into such a scheme of things without the sacrifice of good design and operation. I know that this is your idea."

Pl. 53: Memorandum dated March 13, 1934, from Charles Rees (VCA) to his superior, A. A. Corey, Jr.:

"Mr. Van Fleet was in today and said he wished to discuss the possibility of making some sort of an arrangement whereby a Vanadium operation could be started in the Paradox Valley where our Metal properties are situated."

"Negotiations have been carried on with the Vanadium Corporation of America for procuring their Rare Metals plant at Naturita in the Paradox Valley . . ."

* * * * *

Pl. 54: Letter dated April 5, 1934, from Van Fleet to Gormely:

"As yet, the Vanadium Corporation of America has not signified their intention to continue purchasing oxide from us, nor have they placed a valuation on their plant. They have indicated that they do not wish to be 'out of the picture' in the Paradox Valley. So far, I have offered two proposals for discussion, and the Vanadium Corporation has offered one. The proposals I have made depend entirely upon whether the Vanadium Corporation will continue to purchase oxide. The amount has been variously discussed at from 3,000,000 to 5,000,000 pounds over a period not to exceed five (5) years. The tentative price offered was ninety cents (90¢) per pound V_2O_5."

(There then follows a complete discussion of the three proposals.)

Pl. 56: Letter from Van Fleet to Blair Burwell dated June 6, 1934:

"I had a long talk with Mr. Gormely yesterday about the plants in the Paradox Valley. It appears that the Vanadium Corporation of America is going to be very much disappointed if we do not make some kind of an

arrangement with them for using their plant and supplying them with a considerable amount of V_2O_5. . . ."

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"I called Mr. Reis of the Vanadium Corporation on the telephone this morning and he was much interested in the outcome of my visit to the Paradox. I told him, frankly, that we are making a complete study of the whole situation. . . . I, also, asked permission to have access to their plant so that we could make our drawings and estimates for its reconstruction. The permission will, undoubtedly, be forthcoming but he said he would have to speak to Mr. Corey about it."

Pl. 57: Letter from Charles Rees, Vice President VCA, to Robert Sterling, VCA, dated June 6, 1934:
"We have had several discussions with their Van Fleet during the past three or four months on the subject of joining our properties and plant in the Paradox Valley with their holdings on a mutual operating basis by which each party is to retain unimpaired titles to their holdings. If we come to an arrangement as to conditions and method of operation, one party to the agreement will be selected as the operator and the non-operating member will be represented by an agent to protect its interests."

Pl. 58: Letter from Van Fleet of USV to Charles Rees, Vice-President of VCA, dated July 10, 1934:
"Mr. Sterling furnished Mr. Burwell with plans, and drawings and estimates are now being made for the rearrangement to suit our processes. I will be very glad to advise you when this work is completed."

The negotiations for a joint operation went so far as to allow USV officials to inspect VCA's Naturita plant, its makeup, its equipment and cost of doing business. (Pl. Ex. 56, 57, 58 and 59.)

In 1934, *both* companies simultaneously raised their ferrovanadium prices of $2.60 (open hearth), $2.70 (Crucible), $2.80 (Prime), to identical prices of $2.70, $2.80, $2.90. (Pl. Ex. 10; R. 584; VCA p. 4, UC p. 6.) This price increase was made even though Electromet had a tremendous surplus (UC 127; 2207-2208) and VCA was importing its ore from Peru or purchasing all its oxide from USV and, by necessity, had different costs of production. And despite World War II and the numerous economic upheavals occurring between 1934 and 1947 these ferrovanadium prices remained *unchanged* and *identical* for *both* companies from 1934 to 1947. (Pl. Ex. 10.)

On July 26, 1934, after a comprehensive economic study of the proposed joint operation and a complete analysis of VCA's Naturita plant, its costs, advantages and disadvantages, Burwell recommended that the most economical method of handling the joint arrangement was to construct a new plant at Uravan, Colorado, in the Paradox Valley. (Pl. Ex. 59.) This plant was built by USV for the purpose of supplying VCA, its competitor, with oxide. (Burwell R. 607.)

At this time, Union Carbide became apprehensive about the vanadium situation, so the Union Carbide and Carbon Research Laboratories, Inc. was authorized to prepare a complete survey and special report on vanadium. (R. 628-629.)

In June, 1935, C. E. MacQuigg, an officer in the Research organization, issued a "Special Report on Vanadium". (Pl. Ex. 27.) This report was prepared after thorough consultation with Mr. Van Fleet and other top Carbide officials. (Pl. Ex. 27, pages 2, 35, 54-61; R. 630.)

The alternatives presented by MacQuigg are set forth in Pl. Ex. 27, pp. 36-38.[4]

[4]The MacQuigg report provided:

"As an indication of what business might be expected in case we decided to cut the price to such an extent that competition in this country were practically eliminated *(or by other means such as agreements)* and we sold all of the vanadium, three possible assumptions are presented:

I. We get all of the business in vanadium, but due to the recent trend and in spite of research and development it continues to decline, and therefore in a few years there is little demand for the metal. This assumption is rejected as most unlikely.

II. Business remains the same, but we produce practically all of the vanadium. On the basis of roughly 1,000,000 lbs of vanadium consumed annually, our profit at 84¢ ($2.10 – $1.26) would be $1,141,335 as against a past and present profit of around $297,199 per year ($1.00 × 297,199). From the gross profits, we would have to deduct the cost of research and development mentioned later—a total of some $300,000 over a period of three to five years. Even so, the margin of profit is quite attractive, say, in the neighborhood of $1,141,335 – $100,000 = $1,041,335 for three years, and after that time possibly larger, depending on the demand.

III. Prices are cut still further so that our profit is only 50¢ per lb. (i.e., vanadium sells at $1.76). This reduction in price with the results of our research and development programs, so boosts the consumption of vanadium that the sale is increased to 2,000,000 lbs. per annum. The net profit is still the same as under Assumption II. Some additional advantages might be obtained, as for example those resulting from a new deoxidizer which might use vanadium in large quantities, and while we might make only 50¢ on the contained vanadium we would make a profit on the other elements. Patent protection on such an alloy would be highly advantageous if the alloy had exceptional merit; it is not fanciful to assume such possibilities.

Several conclusions are possible regarding the course that may be indicated by the facts noted in this report, and these may be summarized as follows:

Possible Action	Favorable Results	Unfavorable Results
Take no aggressive action, *but continue to let VCA dominate the market and we sell to them—predicated on a continuation of their patronage.*	a. We take no risk on ill will or *a possible disturbance of the "status quo" in other fields.* b. We will sell the bulk of the vanadium, *with no stimulated competition.*	a. There is no indication that such a policy will do other than kill all of the disappearing vanadium market, after which there will be no business for anyone. b. If matters are allowed to drift as at present, the vanadium business will continue to disappear and the VCA will in time be defunct or at least moribund, thus forcing them into the hands of the present holders of a substantial portion of their bonded indebtedness, *and the latter interests may be expected to make the most of the situation in the whole alloy field.*
I. We sell to VCA *but compel them to take an aggressive attitude* toward stimulating the waning demand for vanadium.	a. *Will avoid friction with the VCA, thus minimizing their entry into stronger competition with us in other alloys, e.g., silicon and chromium.* b. VCA competition would be most serious in chromium, and it is doubtful if they could menace us without ample supplies of ores. *Any mutual agreements would not be jeopardized by this arrangement.* c. The VCA will probably be no sharper a competitor than at present *and if they are absorbed by A.R.Co., they will most likely get "tough" anyway.*	a. *This ties our hands and prevents us from obtaining the bulk of the business through research and development.*
II. *We set our own lowered price* and by an energetic campaign, we eliminate VCA from the field.	a. We can dominate the market and obtain the bulk of the business by virtue of our better economic position and ore supplies. b. We have a free rein to develop new markets and peg the declining use of vanadium. c. *We can eliminate VCA as a desirable adjunct to our competitor in other fields.*	a. We give every cause for retaliation from VCA and one of their large bondholders who would seek every opportunity to thwart us in any possible way. b. *Competition would be engendered needlessly* because of the chance that vanadium as a major steel-making element is done for.

(Emphasis supplied.)

After issuance of this report, Carbide executives discussed which of the alternatives suggested by MacQuigg were to be adopted. (Pl. Ex. 62, 63, 64; R. 629-630.) One of these alternatives was that "we set our own lowered price and by an energetic campaign we eliminate VCA from the field". (Pl. Ex. 27, p. 38, proposal III.) VCA naturally became apprehensive about its ore supply and had its vice-president, Mr. Rees, talk to Mr. Price of Electromet Sales "with reference to the new contract for oxide". (Pl. Ex. 66; R. 1103.) Mr. Price of Electromet Sales told him they preferred to wait "before talking price" as the price would be dependent upon the price of ferrovanadium (Pl. Ex. 66) and that the speed with which USV could proceed at Uravan was dependent on the amount of oxide which USV had to "earmark". (Pl. Ex. 66.) At the time these negotiations between USV and VCA were taking place, Mr. Van Fleet reported to the Union Carbide executives that the price of ferrovanadium could be dropped from $2.70 to $2.00 and still make a profit. (Pl. Ex. 75; R. 1122; the chart attached to the exhibit is discussed at R. 2960-2962.) Mr. Van Fleet's recommendations were not accepted and on January 3, 1936, Electromet Sales entered into another contract with VCA whereby 250,000-375,000 lbs. of oxide were sold to VCA at 80¢ per pound or 30¢ below the market price. (Pl. Ex. 70; R. 1114.)

On March 25, 1936, Van Fleet wrote to Mr. Gormely:

> "On Monday I had a talk with Mr. Bransome and Mr. Rees of the Vanadium Corporation of America in reference to the purchase of some equipment now at their Naturita Plant for use in our Paradox Valley Plant at Uravan. Previous conversations in regard

to the use of Naturita Plant were reviewed by Mr. Rees and myself for the benefit of Mr. Bransome." (Pl. Ex. 72, R. 1115.)

In this letter, Mr. Van Fleet reported a complete discussion between VCA and Carbide of their most intimate costs and production figures. It must be remembered that these are the two chief managing agents of the respective companies controlling 100% of ferrovanadium production and sales. (Pl. Ex. 72.) The letter includes the following:

"The discussion then turned to the vanadium situation in general. Mr. Bransome stated a reduction in price of V in ferrovanadium is indicated, but that a small reduction would do no good; and that their cost of producing vanadium was so high a considerable reduction could not be made. I asked him what he thought would be a 'considerable reduction' and he said to $2.25 or $2.10 per pound. He went on to say that with the fused oxide costing him 80¢ per pound there was little profit in vanadium at the present prices. It developed when he was roughly casting up these figures, that in their present practice it requires 2.2 lbs. of V_2O_5 to make 1 lb. of V in ferro.

"Mr. Rees is the Vice President of the Vanadium Corporation of America, and a Mining Engineer. He is responsible for the Peruvian operation. He told Mr. Bransome that our costs at Rifle were between 60¢ and 70¢ per pound of V_2O_5 and assumed it as being 65¢. With this assumption he considered 80¢ per pound was about as cheap as we could be expected to sell fused oxide from our present stocks. I stated that the Rifle production was, probably, cheaper than the Peruvian production in any case, to which he made no reply.

"Mr. Bransome stated he believed in laying his cards on the table in regard to vanadium production, that he knew he could not fool us, and any other attitude would be foolish to take. He said when he found out what his costs were going to be in Peru, he believed it would be advantageous for all concerned to get together on one production operation. He said that by the time he was ready to discuss this situation he would, probably, know just what our costs would be at the Uravan Plant. Mr. Bransome asked what our costs at the Plant would be. I told him we were in no position to make any definite statement as to this cost at this time, because we were making some changes in the process and were not certain as to how these changes would affect the costs.

"Mr. Bransome stated many times that he was very anxious to reduce the cost of V_2O_5 production to a point where a considerable reduction in the sales price of V in FeV could be made. In this respect I said that there seemed to be a difference of opinion as to the advisability of reducing the sales price of vanadium as to its effect upon sales. Mr. Bransome said his contracts with the steel people seemed to indicate that a considerable reduction would stimulate the use of vanadium." (R. 1116-1118.)

In 1936, USV constructed its new oxide mill at Uravan in order to supply VCA with oxide. (Pl. Ex. 13; R. 585, 607.) It continued to supply VCA with the oxide necessary to make ferrovanadium. In mid-1938 the Uravan plant capacity was doubled to 1,500,000 lbs. *at the request of VCA* for the specific purpose of supplying additional vanadium to VCA. (R. 607.) The steel used to double the plant capacity was supplied by VCA. (R. 608.) The plant's capacity was doubled in spite of the fact that USV had a

surplus of oxide. (R. 669.) This collaboration at this point was between "competitors" who between them controlled 100% of ferrovanadium production and sales.

In 1938, since VCA did not take all the increased production, Burwell complained to Gormely that because of the high inventory, USV was faced with a shutdown of its mining operations. (R. 670.)[5] Burwell recommended that the price of vanadium be dropped so as to increase the demand for oxide. (R. 670.)

Mr. Gormely attempted to help and actually resorted to scheming to avoid the agreement between Union Carbide and VCA not to sell vanadium below the fixed price by attempting to devise a means of "selling vanadium into the consuming industry in some other form than ferrovanadium". (R. 671.) He discussed the problem with Union Carbide and Carbon Research Laboratories, which developed an alloy of silicon and vanadium called silvaz, which could be sold as a "cheaper method of putting vanadium into steel". (R. 670.) This silvaz was sold to test customers, but VCA soon complained that "there had been a breach of their understanding" and that silvaz

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[5] "I said why didn't we go ahead and cut the price of vanadium. I believed that the Vanadium Corporation of America could not produce vanadium at a price of $2.25 a pound and survive. Mr. Gormely said that would put the Vanadium Corporation out of business. I said 'all right, so you put them out of business. What is the difference? We have people down here working. The survival of our business, or the survival of the Vanadium Corporation business?' I said 'Where do our loyalties lie? Why don't we put the Vanadium Corporation out of business?' that is clear words.

"He said if we put the Vanadium Corporation out of business we would lose our controlled competition in ferrochrome. That is the cold words." (Burwell R. 672.)

was "simply a subterfuge or device to sell vanadium outside of their agreement." (R. 671-672; Pl. Ex. 262; R. 2776.) As a result, Electromet discontinued the production and sales of silvaz. (R. 671.)

(b) Elimination of Competition

Commencing in 1938, the war machines of the world were beginning to prepare for World War II. This rearmament gave a surge to the Plateau. Higher export prices stimulated entry into the vanadium business.

But USV learned of these intentions by "outsiders" and in September 1938, Van Fleet instructed Burwell to secure accurate and definite information on the Colorado Oxide Production (Pl. Ex. 29; R. 664) for the purpose of a report to the Board of Directors. (Burwell R. 675.) In this request, Van Fleet wrote (Pl. Ex. 29; R. 665):

> "As I discussed with you the other night on the telephone, it has become very important that we find out accurately and definitely who is producing vanadium ore and where it is going. Along with this, we want to know the quality of the ore shipped so that we can get a line on the pounds of V_2O_5. . . . We may have to do something about this production. . . . These are pretty high prices for us, but it may be necessary to finally do something about it.
>
> "I have an idea that this production of ore which is going to Europe and Japan is quite a quantity of V_2O_5. . . . I have been talking about this for some time here in New York, stating that the high prices maintained for V_2O_5 in Europe will invite and stimulate this kind of competition and can eventually support a considerable vanadium business, with possibly later on a plant."

Burwell acquired this competitive information and made a complete report to Van Fleet specifically so that Van Fleet could report it to the Board of Directors. (Burwell R. 675.) In his report to his superiors, on September 19, 1938, Van Fleet states (Pf. Ex. 30, p. 4; R. 674):

> "*We have already purchased two or three groups of claims which are potential producers and could be the nucleus of an operation.* The intensive development during the past year has made it more imperative to continue this policy and it now appears that we should purchase some properties and possibly install a small plant in Southeastern Utah *to forestall serious competition.* A definite recommendation will be made on this as soon as the field work has been finished." (Emphasis added.)

Soon after, the recommendation was transmitted to Mr. Burwell. (R. 675.) In his own words, the recommendation was:

> "Q. State whether or not there was in September of 1938 a communication from any superior of yours in the United States Vanadium Corporation or Union Carbide with respect to a policy on competitive activities on the Colorado Plateau.
>
> A. Yes, there was.
>
> Q. Was this an oral or a written communication to you?
>
> A. Oral.
>
> Q. And who gave you that oral communication?
>
> A. Mr. Van Fleet.
>
> Q. What was the policy as communicated to you?
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> A. Well, I was, *my instructions were to acquire all the properties on the Colorado Plateau that would*

possibly produce vanadium in competition with the United States Vanadium Corporation.

Q. To acquire them for what reason?

A. To keep them off the market as producers of vanadium.

Q. What market?

A. The American market." (Emphasis added.)

Accordingly Mr. Burwell set out to accomplish this purpose, to eliminate any independent competition or any source of ore that could nurture an independent vanadium business and to purchase or neutralize any *claims* that could possibly be used to challenge the monopoly. The following production was excluded:

Anaconda Copper Co.: USV agreed to purchase its entire yearly output, estimated at 100,000 lbs. yearly. (Pl. Ex. 30.) USV did not need vanadium oxide at this time. (R. 675.) Burwell testified he purchased its entire output only "to keep it off . . . the American market". (R. 675.)

Mammoth. St. Anthony: This mill had an appreciable production of vanadium in 1938. (Pl. Ex. 30.) Burwell testified that he negotiated to take over their production of oxide only for the reason of keeping it off the vanadium market. At this time USV had no need for vanadium oxide, could not sell vanadium, and was facing a shutdown because of a surplus of vanadium oxide. (R. 667.)

Mesa Vanadium Mill: (R. 715-717; Pl. Ex. 239, 240, R. 2565-2566.) This mill opened in 1939. (R. 716.) USV took over its operation though it did not need a mill. (R. 716.) Burwell took over the mill only "to keep it out

of production" (R. 716) and converted it into an ore buying station. (R. 717.)[6]

Loma Mill: (R. 717-719.) This mill started in 1940 in the Yellow Cat mining district area of Colorado. (R. 717.) Prior to the time it was opened, USV had not been purchasing ore in any area close to this independent mill. (R. 717.) After the mill started, USV commenced an ore buying station near the mill, although USV did not need ore at the time. (R. 717.) The buying station was set up specifically to keep the ore away from the Loma Mill. (R. 718.) The purchased ore was hauled 150 miles to the Uravan plant! (R. 718-719.) In spite of this additional hauling cost USV paid no more for the ore around the Loma Mill than it did for its ore at Uravan, which was only a 7 to 8 mile haul.[7] (R. 718.) This "mill closed down for lack of ore". (R. 718.)

Gateway Alloys: (R. 713-715; 2779-2780.) Gateway Alloys was a small independent mill which an individual named Brown leased from the Molybdenum Corporation of America. Burwell received specific instructions "to discourage them in any way we could". (R. 714.) Burwell offered Brown a low price for the oxide and then arranged to lease the surrounding claims. He then stripped these claims of 12,000 to 15,000 tons of easily accessible

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[6]The miners in this area were so desperate for an independent mill that the miners contributed their labor to help build it. (G. Reed R. 927-928.) After its close, the only outlet for the ore in this area was to respondents. (G. Reed R. 928.)

[7]The additional cost to haul the ore from the Loma area to Uravan was "five cents a ton-mile" or $7.50 a ton. (R. 719.) There was no hauling allowance of any type made to the miners in the Loma mill area and the price paid was 21¢, which was the same price paid miners for ore at Uravan. (R. 719.)

and, naturally, inexpensive-to-mine ore. (R. 714.)* To make doubly sure that the ore would not go to the independent mill, Burwell built a road which led away from the mill and down the other side of the mesa. (R. 2779.) At this same time USV had more than sufficient ore at its Uravan mill area and did not need the Gateway ore. Yet it hauled this ore 45 to 65 miles over rough roads from the Gateway area to Uravan. (R. 715.) The reason for this "costly haul" was that USV "wanted to keep another vanadium operation from getting started". (R. 715.) The mill went broke in 1940. (R. 715.)

Nisley and Wilson: This independent mill also closed down because of the activity of respondents. This operation was the subject of the *Nisley* action, in which the jury found that the mill had gone out of business because of the monopolistic and conspiratorial activities of respondents and awarded them $40,000 damages. The facts involving this mill are set out in some detail in the opinion of the Tenth Circuit Court of Appeals which affirmed the judgment. (Appendix A.) The mill closed in 1944. (R. 1176.)

Blanding Mines Co.: During the time that the mill was operating Burwell personally negotiated for their

*(Burwell R. 2779): "So all we did to help Mr. Brown out and offer to take care of the situation in controlling the district, which were my instructions and which I carried out, was to take all of the surface ore that was available that could be economically taken down to the Gateway plant, and to do that we built the road, not down to Gateway; we built a road up the other side, that went down to Mesa Creek . . . which was of no use to the Gateway plant, but over that road we cleaned up all the surface available ores on the claims that bordered the top of the mesa, so that when we were through we had all the available cheap ore that could possibly be used to implement a small plant."

oxide output. (R. 668.) At the time of these negotiations, USV did not need vanadium oxide. (R. 668.) The reason for negotiating for the oxide was that "we were controlling the output of vanadium, keeping it off the market." (R. 668.)

In 1941, Bransome (VCA) traveled to Los Angeles to meet with the owner of the mines, located adjacent to the mill, which supplied the mill and he bought these claims for VCA. (R. 1971-1972.) Much of the Blanding ore was then diverted to VCA's Monticello Mill. (R. 1972.) Prior to the time VCA acquired these claims, the Blanding output was being sent to Apex Smelting Co. (R. 1972), which was the supplier of vanadium for the Continental Ore Co. (Pl. Ex. 81; R. 1168.) After VCA got the claims, the oxide went to VCA. The mill eventually went out of business. (R. 1972.)

International Vanadium Mill (Pl. Ex. 30, p. 3; R. 674): Van Fleet and a USV field engineer made visits to the plant to sample the mine. (Pl. Ex. 30.) They were satisfied that within a short while the mill would fail and they would not have to worry about this mill. (Pl. Ex. 30.) The mill did fail. (R. 767.)

Apex Smelting Co.: This company commenced producing ferrovanadium in 1940. (Pl. Ex. 160; R. 1454.) It had a working arrangement with the Continental Ore Company whereby Continental was to handle ferrovanadium sales for Apex and secure vanadic acid supplies for Apex to produce the ferrovanadium. (Pl. Ex. 81; R. 1168.) VCA actively negotiated with Apex for its equipment and products to put it out of business while the Apex-Continental contract was in force, although Apex had a 14-year

contract with the Continental Ore Co. (Pl. Ex. 79, 80, 81, 82; R. 1167-1170.) Soon after VCA entered the scene, the Blanding Mines Company stopped sending oxide to Apex Smelting Company and it went to VCA. (Burwell R. 1972.) Soon after, Apex ceased making ferrovanadium. (Pl. Ex. 81, R. 1168.)

Continental Ore Co.: Continental Ore Co. sold ferrovanadium in competition with respondents. (Pl. Ex. 160; R. 1134-1135.) In 1942, through the direct intervention of VCA, it lost its relationship with Apex Smelting Co., and thereby its associate in the manufacture of ferrovanadium. (Pl. Ex. 82, R. 1170.)

In November 1943, Continental wrote to VCA (Pl. Ex. 206; letter dated 11-16-43) and to Electromet Sales (Pl. Ex. 207; letter dated 11-17-43) asking for a supply of 10,000 to 15,000 lbs. of V_2O_5 per month and offering to sign a contract for a fixed amount. Both VCA and Electromet Sales almost simultaneously refused to supply the oxide. (Pl. Exs. 206, 207, R. 1951-1953.) Burwell testified that he had heard "in a dozen conferences" that the reason Electromet Sales would not sell oxide to Continental Ore was "because they wanted to keep him out of the vanadium business. *No other reason.*" (Emphasis added.) (R. 2781-2782.)[9]

[9](Burwell R. 2782): "Q. Did any of these corporations, now that you were connected with, make an order, a formal order on policy to that effect, that you know of? A. No smart lawyer would let a corporation make a formal order in writing of that kind of thing. Our instructions were never to write anything down like that." Burwell testified that Bransome personally told him that VCA was trying to keep Mr. Leir out of the vanadium business. (R. 663.)

This company filed an antitrust action in the United States District Court for the Northern District of California, Southern Division.

A judgment entered upon a jury verdict in favor of respondents was affirmed by the Ninth Circuit, *Continental Ore Co. v. Union Carbide and Carbon Corp.* (9th Circuit 1961) 289 F. 2d 86. This honorable Court granted certiorari on October 23, 1961 (No. 304) and it is now before this Court.

North Continent Mines: This was an operation of approximately 40 tons a year. (Pl. Ex. 30, R. 674.) The mill was turned into an ore selling operation by USV. (Pl. Ex. 3; R. 576; UC 141; R. 2369; 852-853; 2430-2431.) It was subsequently sold to Union Mines. Van Fleet was the president of this company and Burwell the vice-president. Union Carbide's plans to control post war conditions included acquiring this property. (Pl. Ex. 230, R. 2414-2416.) Union Mines became the vehicle to accomplish the feat.

Mr. Burwell dramatically explained the reasons for this exclusionary policy (R. 676):

> "At that time we knew we had a billion-dollar field. We were playing the cards for a billion-dollar field. And the way you get a billion-dollar natural resource is to acquire it this way. So all may be the tooth and the fang, but this is the way mining engineers proceed —business people proceed to acquire, control a natural resource, and this policy was directed to me by Mr. Van Fleet, and it was also directed to me previously by other corporation officials previous to 1938. This was a policy that continued from 1926 and had never been stopped."

As already indicated, respondents became particularly concerned about competitors at this time because the European rearmament program which preceded the war in 1939 was generating a new demand for ferrovanadium in Europe and shooting up the export price. (R. 1937-1945.) This demand gave independent mills and operators a market which would have permitted them to establish the nucleus of an independent operation and threatened the monopoly held by respondents. On March 28, 1940, Bransome wrote to a French company that the high export prices were making for people trying to buy domestic and sell export. (Pl. Ex. 205, R. 1947.) Bransome wrote that they had "this phase under very good control, and if any shipments do get away" "they are very small ones." (Pl. Ex. 205.)

And pursuant to their conspiracy, respondents divided the foreign orders that did not "get away". For example, in 1939, when a $640,000 shipment was made to France, Bransome phoned Sneath, the European representative of Union Carbide, and had the order split, one-half to Electromet and one-half to VCA, the price of ferrovanadium being *the same* for both companies. (R. 1937-1940; Pl. Ex. 203, R. 1941-1944.)

In addition, domestic customers were allocated between respondents. For example, in 1940, Burwell, while attempting to sell available uranium concentrates to the Vitro Corporation in Pittsburgh, learned that Vitro could use 100,000 lbs. of red cake. He convinced them that the red cake was better suited for their purposes than the hard fused black oxide they were using. (R. 710-712.) At this time USV had a tremendous surplus of oxide which

threatened to close its mines in the West. (R. 710.) When Burwell enthusiastically reported this prospective sale to Electromet's sales manager he was told that Vitro was a VCA customer and "VCA is selling their vanadium." (R. 711.)

And again in 1946, Burwell was told by the Sales Manager of Electromet Sales *not to mention* vanadium to the President of the Crucible Steel Co., a large steel company, because Crucible was a VCA customer and Electromet Sales personnel had been instructed by their superiors not to approach VCA customers. (Burwell, R. 713.) These instructions were substantiated by Raymond C. Sullivan, who was present at the meeting where these instructions were given Burwell. (Sullivan, R. 2788-2789.)

(c) Fixing the Prices of Ore

As part and parcel of this conspiracy to monopolize the vanadium industry, respondents conspired to fix the prices paid for the raw ore. VCA chose not to open its Naturita plant until 1940 and to allow Union Carbide to produce the domestic oxide and then to purchase the oxide from USV. (Burwell, R. 642.) This left USV free to pay whatever price it desired for the Plateau ore. Instead of competing with USV for the ore, VCA chose to allow USV to purchase the ore at a price fixed by USV and then purchase the oxide from USV at a price fixed between themselves.

In 1940, because of the increasing war demand, it was decided that VCA would open its Naturita plant, which it had allowed to remain dormant while it purchased oxide from its competitor USV.

Prior to the opening of this plant Burwell of USV, Van Fleet of USV and Bransome of VCA met at Mr. Bransome's private club in New York "in or about 1939" or "just prior to the starting of the Vanadium Corporation's plant . . . 1939 or 1940". (R. 641-642.) At that meeting it was agreed that both companies would pay 21¢ a pound for ore, using 2% vanadium as the basing point. (R. 643.)[10] Mr. Bransome admitted discussing ore prices with Burwell. (R. 1903.)[11]

Thereafter, until 1942, *both* USV and VCA paid a base price of 21¢ per pound for 2% ore. (Pl. Exs. 25, 47; R. 589-591; 1007.)

In the spring of 1942, Burwell, Bransome and Kett, General Manager of VCA's mining operations, and possibly Hill met at Dove Creek, Colorado. (Burwell, R. 644-646.) At this meeting VCA and USV agreed to increase the base price of vanadium ore to 31¢. (Burwell, R. 646.) After this meeting both companies commenced paying 31¢ for their ore. (R. 646.) The 31¢ base price remained the base price paid by both respondents from 1942 to the date of the filing of petitioners' complaint in 1958. (UC 157; R. 2500; Pl. Ex. 213; R. 1969.) The prices remained the same "even though the operating costs [were] going up". (Viles, R. 2017.)

Other USV employees verified that there was an agreement on prices. They included J. E. Weston, USV Super-

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[10] (Burwell R. 643): "Mr. Bransome wanted to know what the price was. We told him and Mr. Bransome, to my recollection, said 'All right. We will work with you and we will follow the general ore pricing schedule that you have.'"

[11] (Bransome R. 1903): "Q. Did you ever discuss ore prices with Mr. Burwell at any time? A. I think that probably once or twice." Mr. Bransome subsequently admitted talking to Burwell and Van Fleet late in 1939 or 1940. (R. 1920-1921.)

intendent of Operations on the Colorado Plateau and later USV General Mine Superintendent (R. 2790-2791) and Luther Franklin Watt, field assistant to Weston. (R. 1045-1047.)[12]

Others testifying as to price fixing admissions by respondents included Dennies Nielson, a miner (R. 1013-1017), Howard Balsley, an ore producer (R. 992, 993),[13] and Thomas Skidmore, another ore producer (R. 1053-1054).

At this same time the base price for MRC ore was also fixed at 31¢ and Mr. Hill, in a prior trial, testified that he was told by Mr. Burwell that the "base price" for MRC ore was to be 31¢ *(Hill R. 1415) and that Mr. Burwell* had fixed that price for MRC (Hill R. 1414).[14]

Burwell called a meeting at his home, attended by Burwell (USV), Kett (VCA), Viles (VCA) and Hill (USV

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[12]Mr. Watt testified that he was present on several occasions when Dennis Viles (VCA) and Weston (USV) met on the Plateau to discuss prices paid for ore and that on one occasion he, a USV field man, was reprimanded by Viles, a VCA employee, for "paying more for ore". (Watt R. 1047.) "... as far as sticking my neck out and trying to take it away from them (VCA) by offering more money, no." (Watt R. 1048.)

[13](R. 992-993.) Mr. Balsley testified that he met with Robert E. Sterling, Western Superintendent of Vanadium Corporation operations, and R. D. Renner, General Superintendent at Naturita, and they told him "they had to be leaving soon because he and Slim—meaning Mr. Renner—were going down to Uravan to meet with Burwell and Weston to see if they couldn't get together on this ore price and quit cutting each other's throat." This meeting took place on August 4, 1940. (R. 992.) The next day he saw Mr. Sterling and asked him how "he made out last night down at Uravan". Mr. Sterling replied "We got everything fixed up." (R. 993.)

[14](Hill R. 1415): "Q. In any event, it was Mr. Burwell who told you what price to pay. A. That is correct. Q. And specifically a 31¢ price? A. That is correct."

MRC), Sproul (MRC) and Edwards (MRC) to discuss ore prices. (Viles R. 2018.)

Not only did USV and VCA get together and fix the prices, but they diligently policed the field to make certain that prices were maintained. Direct evidence of this type of policing was presented. For example, on November 2, 1941, S. Power Warren, USV General Superintendent at Uravan, reported to his superior, King Haldane, in New York City, that they had caught VCA attempting to raise the ore prices, but that Blair Burwell had spoken to Ralph Blitz, VCA General Superintendent at Naturita, about it and "his discussion with Blitz remedied the matter." (Pl. Ex. 28; Burwell R. 648-649.)

On December 24, 1941, Haldane in New York wrote to Weston and Burwell in Colorado that Mr. Kett of VCA was protesting in New York to USV that USV was trying to take away one of VCA's miner-customers named Lyen by offering his $2.00 per ton "above the established rate". (Pl. Ex. 31; R. 685.) Haldane had advised Kett that he would look into the matter. (Pl. Ex. 31.) On December 27, 1941, Weston replied to Haldane that Lyen was only a "trouble maker" and that USV had checked into the story only to find that they had furnished Lyen with the regular list price and had "definitely" not offered him more than the established rate. (Pl. Ex. 49; R. 1042.)

And on June 16, 1942, Kett (VCA) wrote to Blitz (VCA) at Naturita that he had been informed that USV was paying a premium for its ore and suggested to Blitz that he should check fast by securing "original settlement sheets", "certified copies" of them or "a sworn statement (affidavit)" from a supplier. (Pl. Ex. 217; R. 2038.)

Throughout this entire period, in spite of this control of raw material, the domestic oxide, by USV, it was VCA that sold two-thirds of the ferrovanadium, the finished product.

(d) Direct Contracts Between Respondents

As further evidence of the conspiracy, in June, 1939, a collusive agreement called the "Maggie C" agreement was entered into between respondents which provided that USV would mine ore from VCA mining claims, convert the ore to vanadium oxide for VCA at USV's Uravan plant at 65¢ a lb. and then deliver the oxide to VCA. (Pl. Ex. 32, R. 696; Pl. Ex. 33, R. 699.) This price was 45¢ below the market price of oxide. At this time VCA could have obtained all the ore it desired from its Peruvian mine at 50¢ a lb. (R. 1894.) Under the "Maggie C" agreement, oxide was delivered to VCA until 1940, and during this time VCA executives had access to USV's records of production, tons removed, grades, costs, etc. (Burwell R. 698-699; Pl. Ex. 8; R. 582.) After all available ore had been mined out of the "Maggie C" claims, VCA was allowed to continue to draw on USV oxide in excess of the amounts of ore being produced from the "Maggie C". (Burwell R. 701.) VCA overdrew its account by 300,000 lbs. of oxide. (R. 1895.)

On September 26, 1941 VCA and USV got together on still another agreement called the "Dry Valley" agreement. (Pl. Ex. 35; R. 709; Burwell R. 701.) This agreement permitted USV to enter the Dry Valley claims turned over to VCA and to mine the additional ore which VCA had overdrawn. (R. 701.) This arrangement continued until 1942. (Pl. Ex. 34; Burwell R. 700.)

The Dry Valley properties originally had been leased to USV by the owners. (R. 1898.) The properties were subsequently offered for sale on a bid basis. VCA was interested in acquiring the properties, as was USV. Van Fleet phoned Bransome and asked him whether VCA was going to bid on the properties. (R. 1898-1900.) Bransome told Van Fleet he was interested and actually revealed the terms *and price* of his bid! (Bransome R. 1900.) Van Fleet thereupon underbid VCA and acquired the claims. When Bransome heard of this, he complained to Mr. O'Shea, president of Electromet and a vice-president of Union Carbide, and asked him to turn these claims over to VCA. (Bransome R. 1899-1901.) Mr. O'Shea ordered Burwell and Van Fleet to return the claims to VCA. (R. 1901.) Almost immediately Bransome entered the Dry Valley agreement with USV to repay the overdraft. (R. 1901-1902.)

During this period, VCA had available to it all the ore it desired in Peru (R. 1902), yet, during the period 1933-1939, USV sold to its only competitor, VCA, 20% of the latter's oxide requirements. (VCA 13; R. 1852-1853.) And almost unbelievably, although, during this period, VCA was purchasing 20% of its raw materials (oxide) from USV, VCA sold ⅔ of the market as to the finished product (ferrovanadium).

In 1939, Van Fleet and Burwell again requested the Union Carbide group to lower the price of vanadium to one in "reasonable relationship to our costs" and thereby increase its demands. (R. 609.) In spite of high inventories which threatened to close down USV's mining oper-

ations on the Plateau (R. 608); the price was not lowered. Instead, Sneath, the European representative of Union Carbide, arranged for the sale of one million pounds of oxide in Europe through a European cartel headed by Sir Edwin Davies. (Burwell, R. 609-611.) The oxide was sold in Germany and not in this country at a reduced price because "there was an agreement between Vanadium Corporation of America and the United States Electro Metallurgical Company" restricting the sales in this country. (Burwell, R. 611.)

(e) MRC Agency

Commencing with the year 1939 and during the war years, the Government issued certain orders concerning strategic materials, allocations, inventory accumulations and export controls. See Stipulation of Facts, R. 2722-2723.[15]

On May 9, 1942, USV was appointed agent for MRC to purchase vanadium bearing ores for MRC mills at Durango and Monticello and, later, the Nisley and Wilson mill at Gateway, Colorado. USV was authorized to pay

[15]These orders and regulations of course did not purport to affect the applicability of Sections 1 and 2 of the Sherman Act. (See *United States v. Assn. of American Railroads*, 4 F.R.D. 510.) The Small Business Mobilization Act affecting antitrust exemption was in effect during World War II. (Act June 11, 1942, C. 404, §12, 56 Stat. 351.) In substance the antitrust exemption provisions of the act required (1) the chairman of the War Production Board to consult with the Attorney General regarding any act or omission requested or approved by the chairman; (2) that the Attorney General issue a certificate to the effect that the plan is in the public interest and that no prosecution under the antitrust laws be commenced with reference thereto; (3) that the Attorney General report such proceeding to Congress and (4) that the certificates of exemption allowed by the Attorney General be published in the Federal Register.

miners up to 50 cents a lb. for 2% vanadium ore. (UC 4, 5; R. 772-775.) The Monticello mill was operated by VCA (UC 5; Pl. Ex. 14; R. 585) and the Durango Mill by USV (UC 4).

This agency contract of May 9, 1942 between MRC and USV contains no language giving or even remotely suggesting that USV was to have an exemption from anti-trust liability. (UC 4; R. 772.) To the contrary, the contract *expressly* states that USV is to comply with *ALL* applicable laws, rules, regulations and orders. (UC 4, Para. 7.) And the contract expressly holds USV *liable* for all negligent and intentional misconduct incurred in the performance of the agency contract even if within the authority granted. (UC 4, Para. 5.)

The individual Ore purchase agreements entered into between USV as agent for MRC, and the miners, including petitioners herein, carried a provision or a rider to the ore purchase agreement that provided that USV, as agent, shall "comply with and give all stipulations and representations required by applicable federal laws. . . ." (UC 96, 98-107; R. 1534-1543.)

Employees of USV were not considered employees of MRC for any purpose thereunder. (UC 4, Para. 2.)

Van Fleet was Vice President, then President of USV, as agent of MRC. Burwell was Assistant to the Vice President of USV, as agent of MRC. Hill was Supervising Engineer for USV, as agent for MRC. (R. 1292-1295; Pl. Exs. 151, R. 1395; 155, R. 1398; 156, R. 1399.)

All these individuals still were or had been executive officers of USV. In fact, these USV officers of the private

corporation USV were the only MRC personnel who had any intimate knowledge of the vanadium-uranium industry. Mr. Whitaker, the MRC consultant, not only had no knowledge of vanadium, but actually testified at the trial he had little knowledge of what the MRC ore buying program was all about. (R. 2602-2604.) Mr. M. Gustafson had no prior experience in the vanadium industry. On cross-examination he testified that he and the members of the AEC Committee on Raw Materials had to rely entirely on the officers of Union Carbide's units and VCA for information on the vanadium-uranium situation. (R. 1820-1822.)

At the trial petitioners introduced substantial evidence that USV as agent for MRC utilized its governmental agency specifically to limit ore prices, to further the existing conspiracy to monopolize between Union Carbide and VCA and to exclude any competition to USV and VCA. The Court below sustained the jury verdict awarding damages for unlawful conduct stemming from the use of MRC agency powers.

The Burwell-Bransome ore price agreement of 1942 which set the base price of ore at 31¢ per pound for 2% ore specifically involved respondents in an agreement involving the MRC ore buying program. (Burwell, R. 645-646; Pl. Exs. 25, 47, R. 590-591, 1007; Hill, R. 1413-1415; Edwards, R. 1548; Kett, R. 2075.)

Burwell fixed the 31¢ price as the MRC base price. (Edwards, R. 1548.)[16]

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[16] "There was a 31 cent base in the Metals Reserve." (Edwards R. 1548.)

Mr. Hill also testified that Burwell fixed and set the MRC base price at 31¢, the same price being paid by USV privately and by VCA. (Hill, R. 1415; R. 2388-2393; Kett, R. 2075.)

When Bransome and Burwell fixed the price of ore in 1942, it was obvious to them that high MRC prices would result in pushing their private purchase prices upward. Bransome readily conceded his concern over MRC prices affecting his ore prices. (Bransome, R. 1929-1931.)

Although 31¢ was fixed as the base rate, petitioners herein received only 12¢ a pound for 1.5% ore from USV as agent for MRC. (Pl. Ex. 117; R. 1306.) Shortly after, VCA obtained 48¢ per pound from USV as agent for MRC for 1.5% ore. (Pl. Ex. 155; R. 1398.)

While the base price for other producers was held at 31¢, in March, 1943, USV, as agent for MRC, entered into this ore purchase agreement with VCA allowing payment of 48¢ a pound *plus hauling allowances* to VCA for 1.5% ore located in Area No. 1; 39¢ a pound plus hauling allowance for ore located in Area No. 2 (Navajo Indian properties); and 48¢ a pound for roscoelite ore. (Pl. Exs. 155, 156; R. 1398-1399.) These prices were the highest prices paid any producer of ore. VCA received a total gross payment of $1,333,725 from MRC funds for its ore. (VCA 29; R. 2625.) And in 1943, respondents paid MRC $1.00 a pound for vanadium oxide (Pl. Ex. 23; R. 588) the price paid being 10¢ below the market price of $1.10. (Pl. Ex. 12; R. 584.)

VCA received the highest price paid for ore on the Plateau by MRC. The true measure of discrimination be-

tween what the miners would have received and what they actually did receive from respondents is apparent from this MRC contract entered into between VCA and USV as agent for MRC. (Pl. Ex. 155; R. 1398.)

The contract, dated March 11, 1943, providing for the payment of 48 cents a pound plus hauling allowance by USV as agent for MRC to VCA for 1.5% ore (Pl. Ex. 155) was signed by J. R. Van Fleet, Vice President of USV, agent for MRC, Buyer, and E. D. Bransome, President, VCA (R. 1398). The Ore Purchase Summary Sheets show that none of the plaintiff miners received 48 cents for 1.5% ore. (Pl. Exs. 170, 249; R. 1470; 2743.) Except for some very high grade ore shipped from Mr. Balsley's claims, no plaintiff in the consolidated trials ever received 48 cents for *any* grade of ore, and this differential could not be explained by cost of production, since the small miners' costs were not much different than VCA's. (Pl. Ex. 234; R. 2424; Letter Hill to Edwards, 9-9-43.)

This 48 cents deal in fact was made under instruction that Page Edwards, the MRC representative, was not to examine VCA's costs. (Pl. Exs. 185, 186; R. 1557-1563.)

Although Page Edwards claimed the 48 cents was arrived at after an examination of VCA's books, the evidence conclusively showed that any such examination would have had to have taken place in two days and Edwards would, in order to have determined VCA's cost, have had to investigate home office administration expenses in New York, since he allowed VCA 85 cents a ton for home office administration expenses. (R. 1558-1568.) There is no testimony in the record that he ever examined

VCA books which would permit him to determine what VCA's overall costs were.

It is uncontradicted in the record that, at the time of the inception of the MRC ore buying program, Burwell (USV), Kett (VCA), Sproul (VCA), Hill (USV), Edwards (MRC), held a meeting at Burwell's home at Burwell's request and discussed ore prices (Viles R. 2018-2024.)

The independent miners were kept uninformed that USV as agent for MRC had authority to pay as much as 50¢ per pound for ore. (Reed R. 910, Hill R. 1380-1382.) Many miners were not even offered MRC ore purchase agreements. Stanley Reed, a miner, testified that USV did not inform him of the MRC program and its purposes or offer him a better price with MRC funds even though at the time, USV was acquiring his claims because the low prices being paid him by USV individually did not permit him to operate his mines without going into debt to USV or even to make a living. (Reed R. 906-911.)

USV as agent for MRC was not authorized to divert ore away from independent mills producing vanadium oxide. (R. 1568; 1245-1246.) In fact, MRC was to encourage production. Yet Burwel USV officer of the MRC agency, actually diverted miners away from the Nisley-Wilson independent mill at Gateway, Colorado. (R. 1136-1138.)

Mr. Gardner, who was active in this operation, was summoned to his office by Burwell. When he reported to Burwell, Gardner was told that Burwell did not want him to operate the independent mill. (Gardner R. 1284.) When

Gardner stated he could not understand how a little 15 to 20 ton mill could interfere with such a large organization as USV, Burwell told him "I don't intend to let you operate." (Gardner R. 1285.) Gardner protested that with a war going on and the government in dire need of vanadium, the United States would not permit Burwell to close a mill. Burwell told Gardner, "I AM THE GOVERNMENT." (Gardner R. 1285.) Mr. Gardner testified that it took Burwell 18 months to do it, but he proved it! (Gardner R. 1285.)

When in October, 1942, Nisley protested these predatory tactics, Mr. Whitaker of MRC expressly instructed USV to supply ore to Nisley and Wilson immediately. (Pl. Exs. 111, 112; R. 1176-1178.) But ore was not delivered immediately and as a result of this delay Nisley and Wilson were not able to start full operation until April, 1943. (R. 1178.) The deliberate delaying tactic injured the young mill. When Nisley protested to Hill about the long delay in getting the mill into production, Hill told him:

> "Regardless of what the War Production Board said, or what the Metals Reserve Company said, my salary is paid by the United States Vanadium Corporation and they tell me how this is to be handled." (Nisley, R. 1176.)

While the miners were being diverted from the Nisley-Wilson scales by Burwell, his associate Hill was making arrangements with the Trustees of Gateway Alloys, the owners of the ore bodies surrounding Nisley's oxide mill, to shut off all supplies to Nisley and Wilson. (Pl. Exs. 237, 238; Cole R. 2531-2537.) Soon after this Trustee of

the Gateway properties, Ennis Cole, entered into a deal with John Hill, USV agent for MRC, to sell ore to MRC. Cole received a 4 cent a pound royalty for all ore sold to MRC; however, Cole did not put up one penny of investment to receive this financial sinecure. (Cole, R. 2537.)

Hill, the USV-MRC officer, terminated the Nisley-Wilson toll agreement on December 28, 1943. (Pl. Ex. 113; R. 1178.) However, VCA's MRC ore selling operation to MRC and the operation of the Monticello oxide mill by VCA was not terminated until February 29, 1944. (Pl. Ex. 14; R. 585.)

Nisley and Wilson thereafter went out of business. (R. 1194-1197.)

In addition to Nisley & Wilson, the North Continent Oxide Mill was turned into an ore selling operation by MRC in the middle of the oxide shortage (Pl. Ex. 3; R. 576, 853), as was the Blanding mill (Pl. Ex. 3; R. 576, 2430, 2431.)

The MRC vanadium program terminated in February, 1944. (Pl. Ex. 142 at p. 3; R. 1369.)

Thus, when the MRC agency was terminated in February, 1944 the Plateau was entirely controlled by the defendants. All independent millers of vanadium oxide were out of business. Defendants were in possession of the only mills at Rifle, Uravan, Durango, Naturita, and Monticello. Large and valuable ore bodies, such as the Wade and Curran properties, Skidmore's Lumsden Group (Pl. Ex. 184; R. 1490), Blake's Gyp and Valley View claims (Pl. Ex. 182; R. 1489), had been acquired by respondents, who at that time, alone knew of their uranium value. "We had 90% of the field." (Burwell R. 753.)

Petitioners owned valuable vanadium claims from which they were selling ore to MRC. Respondents coveted these claims, which could form the "nucleus of an independent operation".

Hill terminated petitioner's ore purchase agreement with MRC although they had a "duration of emergency clause". (R. 1366-1381.) Although petitioners requested MRC that they be allowed to pay off $3000 owed to USV by purchase of their ore (Pl. Ex. 145; R. 1377), this request was refused.

As will be shown in detail hereinafter, the indebtedness of $3000 was then used as the means of acquiring the Wade-Curran interest for respondents. (Pl. Ex. 138; R. 1361.)

Under this evidence, the jury could well conclude, as it did, that, as part of their pre-existing conspiracy, respondents used USV's MRC agency powers to control the prices paid for ore, to monopolize the field, to run independents out of business and to acquire valuable claims to insulate themselves from competition in the post war period or to prepare for the uranium bonanza which they knew was in the future. The Appellate Court below found this to be true in its opinion. The realistic appraisal of this evidence is that the economic factors unleashed by the war threatened the active monopolization which Carbide and VCA had achieved, and that Carbide thereupon used its agency powers to neutralize this threat. It is almost an economic axiom that wars and preparation for wars spawn new business organization. Carbide itself was formed in 1917. Yet at the end of the war Carbide and VCA had effectively eliminated any independent from

surviving. The jury found that Carbide used its agency powers from the government to further its basic plan of monopolization with VCA. And the Appellate Court below agreed. Under the stress of economic circumstances created by the war, the monopoly could hardly have been maintained unless the extraordinary power of government in Carbide's hands was enlisted in aid of its furtherance and perpetuation.

(f) Uranium

Uranium and vanadium are intertwined in carnotite rock. When respondents purchased carnotite ore, they necessarily received both the uranium and vanadium imbedded in the rock.

For a long while, uranium was sold only for its use in ceramic colors. Howard Balsley purchased *only* the *high grade uranium ores* for the Vitro Company, which used it as a pigment in ceramics. Otherwise miners were never paid for uranium content from 1937 to 1947—in spite of the following events:

In 1938, two German scientists by the names of Hahn and Strassman split the uranium atom. (Dana, R. 2224-2225; Burwell, R. 731-733.) In 1938, Sneath, Vice-President of Electromet, who headed Carbide's European operations, visited Uravan because he had heard of a "new element metal being produced in a small way, of uranium" and Van Fleet had told him that USV had a quantity of this new metal in sludge piles, which *"seemed a little fabulous"*. (Sneath, R. 2341.)

As early as 1938, the Union Carbide group of companies became aware of the new possibilities of the use of ura-

nium for atomic energy. (Burwell, R. 719-723.) Burwell testified (R. 727):

> "Again in 1939 and in 1938 and years prior to that we, or I, had definite knowledge of the value of uranium as its atoms structure for energy. . . ."

In 1938, there was the explanation by Lise Meitner of the experiments conducted by Hahn, Strassman and Meitner in Germany as to the release of energy by splitting of the atom. (Groves, R. 1587.) And in January, 1939, Enrico Fermi revealed this fact in the United States in his famous address in which he suggested the possibility of chain reaction by the splitting of the atom. (Dana, R. 2225.)

This information "fired the whole imagination" of Carbide officials. (Burwell, R. 732.) General Groves testified these revelations "probably got the scientific people greatly excited" and emphasized the potential value of uranium. (Groves, R. 1587.) Burwell discussed the matter of "future use of uranium" with officials of Union Carbide on many occasions in 1939. (Burwell, R. 720, 732.) He soon appeared before the "principal officers" of Union Carbide, and sought authorization and finances to construct a uranium recovery unit, which was eventually granted. (R. 720, 721.) At these meetings, he told his superiors that the construction of the unit "was related to a potential use of uranium in connection with the energy of the atom". (Burwell, R. 721.) As a result of this information, a uranium recovery unit was authorized and constructed at Uravan in 1939 for the specific purpose and objective of developing "a supply of uranium for an anticipated use of uranium as an energy source". (Bur-

well, R. 720.) Burwell was the USV officer assigned to this project and he "laid out the design and provided the metallurgical process control directions" and "supervised construction and operation of the plant". (Burwell, R. 720.) This plant processed approximately 100,000 tons of tailings for their uranium content. (Burwell, R. 719-723.) These tailings included the tailings from all ore sold to USV by independent miners from 1939 to 1942. (Burwell, R. 719-723.) For this ore the miners were paid *nothing* for uranium content, even though Burwell testified that he and Carbide knew that uranium had value as early as 1938. (Burwell, R. 727.)

Burwell testified (R. 720):

> "The project of recovering the uranium from the tailings was a process. The main purpose and objective was to develop a supply of uranium for an anticipated use of uranium as an energy source, which we knew of at that particular time, in 1939 or prior to that."

In the absence of the conspiracy to monopolize and to restrain it would have been impossible to pay the miners *a net zero* for the valuable uranium element. At this point the security question was not in the picture at all.

The war in Europe commenced in September, 1939. In November, 1939, Dr. Leo I. Dana, Vice-President of Technology of the Linde Air Products Company, another Carbide subsidiary, who was in charge of the company's research laboratories at Tonawanda, New York, made a special trip to Uravan to examine the tailings. (Dana, R. 2219.) As a result of this trip, it was agreed that samples of uranium would be sent to Tonawanda "to

carry out the rather broad investigation of the future potentials of the corporation to produce uranium, and the methods for refining to suit the possible markets which might be developed as a result of its atomic position". (Burwell, R. 724-725.) Burwell started construction of the recovery plant in 1939. On May 4, 1940, he wired Dr. Dana that he expected to have the "uranium product" in mid-May, 1940, that he would ship 1,000 lbs. of sludge at that time and that he would be in Tonawanda himself within a week. (Pl. Ex. 37; R. 726.)[17]

Neither General Groves nor any government agency prevented Carbide or VCA from paying for uranium content in the ore in 1940 or 1941. (Groves, R. 1592-1593.)

In 1940, of course, Burwell and Bransome met in New York and agreed to pay the miners a base price of 21¢ for 2% vanadium ore and nothing for the uranium content. (Burwell, R. 641-643.) This agreement was made on behalf of USV by Burwell, who, as early as 1938, was aware that uranium had a definite value for energy purposes; in fact, he was actually in the process of constructing a unit to recover it in 1939 at Uravan. (R. 719-720.) Obviously, by agreeing to pay for vanadium only, a necessary and implicit result of the price fixing agreement

[17]Although at the trial respondents claimed that this experimentation was for ceramic purposes only, the falsity of this claim was made obvious when it was shown that the May 4, 1940, telegram was marked, "Restricted" in two places (Pl. Ex. 37) and Dr. Dana, on cross-examination, testified that the telegram was not marked "Restricted" because of the ceramic industry, that there was nothing secret or restricted about the ceramic industry, and he could not explain why it was marked "Restricted" if only the ceramic industry was involved. (Dana R. 2231.) Mr. Burwell testified that the fact that the telegram was marked "Restricted" had nothing to do with the ceramic industry. (R. 725.)

was that the price of the valuable uranium was fixed at nothing.

By May, 1940, Union Carbide had actually commenced recovering uranium oxide at Uravan. (Burwell, R. 719-724; Pl. Ex. 37.)[18]

As further evidence of the knowledge of Carbide of the value of uranium, in 1941 a book by Jack DeMent and H. C. ...hl entitled "Uranium and Atomic Power" was published revealing the value of uranium. (Pl. Ex. 261; R. 2775.) Both Burwell and Dr. Dana, Carbide's top research man in this field, acknowledged that they read the book. (Dana, R. 2332-2333; Burwell, R. 728.) Still nothing was paid the miners for the uranium content in their ore.

In 1938, Van Fleet had met with Burwell and Sneath at Uravan and discussed the "new element", uranium, which "seemed a little fabulous". (Sneath, R. 2341.) Soon after, Van Fleet wrote Burwell asking him to secure definite information on Colorado oxide production. (Pl. Ex. 29; R. 664.) After Burwell's report, Van Fleet reported to his superiors that "we have purchased two or three groups of claims which are potential producers and could be the nucleus of an operation". (Pl. Ex. 30; R. 674.) He soon instructed Burwell to "acquire all the property in the Colorado Plateau that would possibly produce vanadium in competition with the United States Vanadium Corpo-

[18]During this period there were no government controls or involvement. General Groves testified that the first contact between the government and Union Carbide was in 1942 when a predecessor organization of the Manhattan project purchased some graphite from the National Carbon Company, another Carbide subsidiary. (Groves R. 1592.) The Manhattan District was not even formed until fall, 1942. (R. 1711.)

ration". (Burwell, R. 675.) Burwell then launched his program of eliminating any independent who could start any competitive business, as he was "playing the cards for a billion dollar field". (Burwell, R. 676.)

(g) The Manhattan District and Union Mines Development Corporation

The Manhattan District was organized in the fall of 1942, as a special emergency district by the War Department to attempt the development of an atomic weapon for use in the war. (R. 1711.) It is clear that from this date in 1942 respondents adopted the policy of paying nothing for the uranium content of the ore, long before any contact with any security regulation.

In November, 1942, Linde Air Products entered a contract with the Manhattan District authorizing Linde to expand its Tonawanda laboratory solely to continue its production of uranium oxide. (Dana, R. 2346-2346A.) The Government subsidized the expansion of this plant by the payment to Linde of $1,449,000. (Pl. Ex. 228; R. 2237; R. 2346-2346A.)

On May 11, 1943 Union Mines Development Corporation, a wholly owned subsidiary of Union Carbide, entered into a letter agreement with the United States Corps of Engineers. (UC Ex. 17; R. 797.) The letter agreement authorized Union Mines to work on the development of uranium resources and beneficiation of uranium. The letter, however, specifically provided:

> ". . . All applicable contract clauses required by Federal Law and Executive Order to be incorporated in contracts for the services of the kind herein specified, are hereby incorporated herein by reference."

The Corps of Engineers specifically provided that Union Mines was to act in good faith in all its activities. Union Mines was held harmless except where:

> ". . . such loss, expense, damage or liability is due to the personal failure on the part of your [Union Mines] corporate officers, or other of your representatives having supervision or direction of the work as a whole, to exercise good faith or that degree of care which they normally exercise in the conduct of your business."

On April 17, 1944, an exploration and development contract was executed between Union Mines and the Corps of Engineers effective retroactively to May 1, 1943. (UC Ex. 17, R. 800.) The contract allowed Union Mines to purchase properties believed to contain uranium deposits in the name of Union Mines for the United States. (Id.)

USV's Van Fleet was president of Union Mines and Burwell was vice-president of Union Mines. (Id. and R. 731-733.)

12½% of the total uranium processed by the Manhattan Project was of domestic origin, the remaining 87½% of foreign origin, principally from the mines in the Belgian Congo, Katanga Province, all of which were flooded and under water during the period that the project was desperately seeking uranium. (Merritt R. 1712, 1728-1730.)[19] During the Manhattan District period, both USV and VCA sold tailings and uranium bearing sludge to the

[19]Dr. Merritt testified that the ore obtained was not from the mines, but from tailings that had been stockpiled before their flooding. (Merritt R. 1728-1730.)

Manhattan District.[20] (Pl. Ex. 159, R. 1453.) These tailings and concentrates included the savings from the carnotite ore sold by the independent miners to respondents and for which no payment for uranium content was ever paid, was being paid or has since been accounted for. In November, 1943, Hill (USV) and Viles (VCA) discussed uranium payment. (Pl. Ex. 232, R. 2421.)

Although vanadium was in demand during the war, by November, 1943, the demand had been satiated, the shortage was at an end. (Pl. Ex. 221, R. 2153; Pl. Ex. 264, R. 2777.) At that time, Carbide and VCA officials were aware that the prize was uranium and had already commenced making plans to insulate their post war future and to prevent any competition. Burwell testified (R. 616):

> "Then there was still another great thing developed. Of course, by this time we knew, as engineers, and all of us knew, and I think even the VCA knew, because they had some smart men in the field, too, that this field was a rich prize, one of the greatest mineral resources of all times for new things in energy and new things in steel. Therefore, the control of the future lay in who had the first market place and the first plants to take it on, and a trickle at that time would become a river of money later on."[21]

In October, 1943, Burwell made a complete report to Van Fleet, Rafferty and Halliday at Carbide headquarters

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[20] Union Carbide sold $1,593,165 of uranium values, 1943-1947 (Pl. Ex. 161; R. 1455); VCA sold $670,088. (Pl. Ex. 162; R. 1461.) See also Pl. Ex. 159 showing unit prices of uranium material sold to Manhattan District.

[21] Respondents made a **net** profit from sales of uranium products in the ten year period, January, 1948 to December, 1957 of $24,747,257. (Pl. Ex. 168; R. 1468.) This was the trickle that became the river.

in New York that "a situation was developing in which uranium promises to become the valuable element and vanadium a by-product". (Pl. Ex. 230, R. 2414.) He recommended the acquisition of *key properties* on the Colorado Plateau to protect the corporation for its future uranium and vanadium business. (Pl. 230.) Of course, petitioners held one of the "key properties" on the Colorado Plateau. Burwell was careful to recommend that any evaluating of the ores be performed by USV and not by Union Mines. (Pl. Ex. 230, p. 4.)

(h) Cementing the Monopoly for Post-War Developments

This insulation for the future demanded the predatory practices against the independents which the jury and the Court below found to have occurred. Thus in December, 1943, Mr. Nisley of the independent Nisley & Wilson Mill, after being allowed to visit the Uravan plant by the Army, succeeded in working out a process to extract uranium. (R. 1181-1183.) He reported it to the Army, and "ended up in an office with Mr. Burwell". (Nisley R. 1182.) Mr. Burwell told him "I won't permit you to get into the uranium business". (Nisley R. 1183.) He never did get into the uranium business.

On January 1, 1944, the Nisley & Wilson Mill stopped production (Nisley R. 1180) and with the demise of this mill, all independent mills on the Colorado Plateau were out of business. (Pl. Ex. 3.)

Independents contemplated acquiring the Durango Mill. That mill was built for $100,000 for MRC, but USV was given an option to buy the mill at a depreciated price. (R. 1354.) Burwell supervised the building of the plant and ran it. (Burwell R. 694-695.)

Haldane informed Mr. Rafferty, one of the chief Carbide executives, that USV considered it highly essential that USV acquire this Durango plant for several reasons, included among which were (Pl. Ex. 137, R. 1358 at 1360):

> "To maintain its position in the vanadium industry of the southwest. Repeated reports have reached this Company of plans of outsiders to acquire the plant in the event United States Vanadium Corporation decides not to exercise its option. *The injection of additional operators in this field would undoubtedly seriously disturb conditions in the vanadium industry in the post-war period* . . .
>
> "You are aware of the discussions now going on between United States Vanadium Corporation and Army officials covering the application of an alkaline leach to crude carnotite ores. Tests to date indicate a 90% extraction of the U content and approximately 20% of the V. Arrangements are now being studied for the installation of a 50-ton unit embodying such a flow sheet . . .
>
> Durango would, furthermore, be the logical place to treat the Uranium ores of the Navajo Indian reservation, as well as those from the McIntyre Canyon section." (Emphasis added.)

The uranium ores referred to in this communication included petitioners' ore claims. (R. 1361.)

USV exercised its option and purchased this plant for $75,000 (R. 694-695), despite the fact that at this time there was a surplus of oxide and USV's plant at Urayan was either closed or in the process of closing. (R. 1355.)

In 1945 VCA acquired the Monticello Mill under lease from DPC. (Pl. Ex. 14, R. 585.) Mr. Viles had previ-

ously stated that the acquisition of Dry Valley properties would be "a good investment if only to prevent some outsider getting ideas in regard to the Monticello plant." (Pl. Ex. 36, R. 709.)

VCA had never intended to pay the miners for uranium. (Trudeau R. 1104-1105.)

It was during this period that respondents made the arrangement to acquire rich claims in the area (Pl. Ex. 320, R. 414) including Petitioners' properties by Union Mines Development Corporation (Pl. Ex. 151, R. 1395), which ores it would be "logical" to treat at Durango. (Pl. Ex. 137, R. 1358.) As to VCA see Pl. Ex. 216, R. 2033.

By these acquisitions and the exclusion of all other mills, respondents had a 100% control of all oxide plants.

On July 16, 1945, the test bomb was exploded at Alamogordo, New Mexico (R. 1585-1586) and in August, 1945, the first atomic bomb was dropped. By that time there was no question that uranium had economic value. (R. 1586-1587.) Yet respondents who were selling uranium to the government for profit, still refused to pay the miners for average uranium content after the bomb was dropped. The first price schedule for payment for average content of uranium in the Colorado Plateau was published by VCA in April, 1947. (Pl. Ex. 213, R. 1969.) Counsel for VCA stipulated that prior to April 1947, VCA did not pay miners for average uranium content. (R. 931-932.)

In February, 1946, Van Fleet requested Burwell to prepare a study to permit the lowering of the fixed ferrovanadium price. (Burwell R. 686.) Van Fleet informed Burwell that Electromet had decided to lower the price

of ferrovanadium and that the reason for the change in policy was that VCA was selling a ferrochrome silicon[22] at a low price and that Electromet considered this "a breach of understanding between the two companies". (Burwell R. 686.) However, the prices of ferrovanadium were not lowered after Burwell prepared his study. Mr. Burwell testified that he subsequently discovered that the reason for not lowering the price was that Carbide wanted to maintain the price of ferrovanadium and did not want to gear the production of vanadium to uranium. (R. 686-690.)[23]

Burwell desired to gear the production of vanadium to uranium because the "future of uranium was so important that uranium had to be obtained ahead of vanadium and without any regard as to whether you would sell vanadium or not". (Burwell, R. 688-689.) He requested that expenditures be made for the development of uranium as prime material and vanadium as the by-product. Priestley refused to permit a decrease in the price of ferrovanadium and opposed Burwell's proposal to concentrate on uranium because it would provide surplus vanadium. Mr.

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[22]Ferrochrome silicon is an alloy material that can be used with chrome or as a substitute for low carbon ferrochrome.

[23]Burwell testified that he attended a meeting at Carbide headquarters attended by the top officers of the Group. Haggerson, president of Carbide; Priestley, president of the Metal-Chemical division of Carbide; Rush, Counsel; Davidson, vice-president; McClure, vice-president of a Carbide division; and three or four other vice-presidents of the corporation who constituted the active management of Union Carbide. Mr. Rush is presently head of the Nuclear Division of Union Carbide. He is a member of the Board of Directors, Supervisor of Oak Ridge. (R. 2223.) He was one of the leading figures in many of the transactions testified to at the trial. He was invited to be present to testify throughout the trial. (R. 2223.) Mr. Rush was never produced.

Burwell left this meeting stating that if Carbide did not have a "deal with VCA they could sell the vanadium". (Burwell, R. 686-690.)

Further evidence of the agreement between VCA and Carbide was the bid-rigging incident of October, 1946. Priestley suggested that USV refuse to accept a bid it had won from the government and, instead, suggested that Carbide split the bid with VCA, which had lost the competitive bid. (Burwell, R. 690-694.) The reason given by Priestley was that VCA had just agreed to increase the price of ferrochrome silicon to a point where it would not be used as a substitute for low carbon ferrochrome and that, for this reason, he didn't want to antagonize VCA. (R. 693.)[24]

Just three months prior to this attempt at bid rigging to split the market with VCA, Burwell had been informed by Mr. DuTot, Electromet Sales, Sales Manager, not to attempt to sell vanadium to the Crucible Steel Co. because it was a VCA customer. (Burwell, R. 712-713.)

On December 31, 1946, the Manhattan District was terminated (R. 1724) and the Atomic Energy Commission took over its operation in January 1947. (R. 1725.)

The government policy was not to make any effort to develop the Colorado Plateau, but to treat uranium only as a by-product of vanadium. (R. 1811-1814; Pl. Ex. 196; R. 1736.) The principal sources of uranium during this period were from the Belgian Congo and a small mine in

[24] (Burwell R. 693): "Mr. Rafferty said, 'Mr. Priestley do I understand that you are still conniving on this business with the VCA? I thought we were all over that kind of monkey-business . . ."

Arctic Canada. (R. 1813.) There had been no vigorous program of developing new sources of uranium or the rich resources of the Colorado Plateau. (R. 1813.)

During this period the principal advisers of the people setting this policy were the officials of respondents. (R. 1820),[25] and respondents were interested in maintaining the importance of vanadium and its artificial price because of the agreement between themselves and the large investments they had made in vanadium.[26] In 1946, Burwell had attended a meeting of Union Carbide officials and recommended that uranium be developed as a prime material with vanadium as a by-product. (Burwell, R. 686-690.) Burwell recognized the richness of the Colorado Plateau and realized the danger of depending on Congolese uranium mines which were under water throughout this period and the period when the atomic bomb was being developed. (R. 1729.) However, Carbide officials objected to the proposal because they were concerned with

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[25]John Kyle Gustafson was associated with the Executive Vice-President of MRC. He went to the AEC in 1947. His vanadium experience to 1943 was one trip to the Colorado Plateau. (R. 1820.) He had no experience in the vanadium industry at all. (R. 1820.) His entire knowledge, for practical purposes, came from appellants. (R. 1820.) His entire uranium experience came from Union Mines, which was administered by USV and from Burwell and Van Fleet, Viles and Bransome. (R. 1821.)

[26]There are two ways to produce ferrovanadium. One is by using electric furnaces, which was the process used by appellants. The other is by an alumino-thermic process requiring no furnace. (Burwell R. 618.) Continental Ore sold a product called Van-Ex, which required no furnace but only the direct introduction of oxide and ores in a steel bath. (Priestley R. 2174.) Priestley testified that Carbide was deliberately discouraging this because Carbide had hundreds of thousands of dollars invested in plants and furnaces. (Priestley R. 2173-2174.) He actually reprimanded a salesman for selling the substitute. (Priestley Pl. Ex. 226, R. 2174-2175.)

the protection of their vanadium investment. (Burwell, R. 686-690.) Burwell left the meeting heatedly announcing that if Carbide ceased making "deals" with VCA, this problem would be solved. (Burwell, R. 686-690.)

In 1948, a comprehensive re-evaluation of the situation was made and the United States' uranium policy was changed. (R. 1813-1824.) The Atomic Energy Commission then decided to emphasize the procurement of domestic ores and thereby spur the development of the Colorado Plateau. The big spurt did not occur until late in 1951. (R. 1734; R. 1815, Pl. Ex. 196, R. 1737.) One of the reasons for reversing its policy was that "considerable protest" was beginning by Senators Johnson and Milliken of Colorado and independent miners over the fact that the independent miner was not being given a chance to develop the uranium reserves of the Colorado Plateau. (R. 1823.) One of the leaders in this protest was Burwell. (R. 1823.)

Van Fleet died in October, 1947. (R. 1672-1678.) After his death, Mr. Emigh of USV made a search of his home to recover certain documents, which had in the meanwhile been forwarded to Burwell. (R. 1672-1678.) Soon after, in December, 1947, Burwell resigned from USV. (Burwell R. 658.) After his resignation, Burwell was offered $50,000 as a price for his silence. (Pl. Ex. 193, R. 1689.) He rejected this.

After his resignation from the Carbide organization, Mr. Burwell was still concerned over the failure to develop the uranium resources of the Colorado Plateau and that the production of uranium was being limited by appellants by gearing its production to vanadium. (Burwell R. 658-663.) So Burwell prepared a proposal for the

building of a plant in the Colorado Plateau designed to recover uranium as the prime material and produce vanadium only as a by-product. (Burwell R. 659.) This plant was to be operated by the Molybdenum Corporation of America (Burwell R. 661-662) and was similar to the plan he had presented to Carbide in 1946, which plan had been rejected because Carbide was concerned with maintaining vanadium prices (supra). He presented this proposal to Mr. Bransome of VCA. The plan was rejected. (Burwell R. 683.) The reason for its rejection was that VCA desired to maintain its vanadium market and feared that the plan would permit independent operators to get into the vanadium business and compete with it. (R. 663.) Burwell testified at R. 663:

> "Mr. Bransome said 'Blair, supposing independent producers of ore, and there were a number at that time had developed—I suppose these independent producers of ore had vanadium and uranium ore and brought their ore up to this central plant that you propose. The vanadium then would be turned back to them to sell or to dispose of, isn't that correct?'
>
> I said, 'Yes, that's correct.' I said, 'We cannot in this particular emergency deny any person the right to get his vanadium back,' that this situation had now become bigger than either the Union Carbide or the Vanadium Corporation of America, in my estimation.
>
> Then he asked this: 'What would happen if somebody like Continental Ore or Mr. Leir shipped some ore to this central plant? Would he get the vanadium back?' I said, 'Surely, he would. So would anybody else who owned the ore. They would all have to have the same right.'

> Mr. Bransome said, he paced back and forth in his office, he said, 'That would put Mr. Leir into the vanadium business and that is what we are trying to keep him out of.' "

The plan was not carried out because of these objections. In fact, in 1947, Mr. Bransome informed the AEC that VCA would not process ore for uranium unless it was paid for the vanadium. (Merritt R. 1727-1728; VCA 10, 11; R. 1714.) The original contract proposed no payment for vanadium. (Merritt R. 1726-1728.) Bransome threatened to close the plant down unless he were paid for both vanadium and uranium. (Merritt R. 1725-1726.) The uranium was required so AEC agreed to pay 98.475 cents a pound for vanadium they did not want. (Merritt R. 1728.) And since the government was paying for the uranium, Bransome suggested to the AEC that the price for the uranium should include a payment to the miners for the ore (Merritt R. 1727), and it was Mr. Bransome who fixed that price at 50¢. (Merritt R. 1729; Bransome R. 1968.) Captain Merritt testified he took the price suggested by Bransome without any protest. (R. 1749.)

So it is that the position of Mr. Priestley and Mr. Bransome to continue to treat uranium as a by-product for fear of surplus in vanadium tailings was actually incorporated into the policies of the AEC. Plaintiffs' Exhibit 196, R. 1736, the Statement of John K. Gustafson, Manager, Raw Materials Operations, U. S. Atomic Energy Commission, December 17, 1948, stated:

> "Following the war it was tentatively decided by the Manhattan District to purchase only by-product uranium rather than to stimulate and support increased

production by special incentives. This position was based on the fact that the known uranium reserves of the Colorado Plateau were limited and expensive to mine and process and that the only advantage of an accelerated program would be to make this limited supply available sooner. Since the estimated annual production of the Colorado Plateau, even under an accelerated program, would be small in relation to total U.S. requirements and to supplies available from foreign sources, it appeared more economical to obtain the uranium as a by product from the vanadium operations which were geared to the vanadium market."

This report then adopts a moderate program to develop the uranium potential of the Plateau. It was not until about four years later that the uranium boom hit. (R. 1734-1735.) In the meantime Mr. Burwell opposed the limited AEC policies and protested to Senators Milliken and Johnson. (R. 1824; Pl. Ex. 38; R. 872.) By the time of trial the American production of uranium had outstripped the rest of the world combined. (Pl. Ex. 195; R. 1731-1735.)

It is clear that there was abundant evidence that the respondents retarded the development of the Colorado Plateau to protect their vanadium monopoly, and that they used their vanadium monopoly to get the inside track in the uranium industry.

Almost unbelievably, throughout the entire period 1948-1957 despite the rising ferrovanadium and vanadium oxide prices of appellants, the miners uniformly were paid 31 cents a pound as a base price by respondents for vana-

dium, the same price fixed after the meetings of 1942, and valuable claims such as petitioners' claim were purchased for a pittance. Throughout the period 1938-1958 appellants made net profits of $70,000,000. (Pl. Ex. 168; R. 1469.)

(4) EFFECT OF CONSPIRACY TO MONOPOLIZE ON PETITIONERS

(a) Introduction

The Wade and Curran transaction was part and parcel of the general conspiracy to monopolize the vanadium industry for which the jury found against respondents. The Court below sustained that determination. As applied to this case that conspiracy can be set down as follows:

1. Respondents conceived a total plan to monopolize the vanadium industry.

2. Direct evidence, based upon the confession of Burwell and the corroboration of the contemporary documents, proved that an essential part of the conspiracy to monopolize was the sedulous ferreting out and destruction of independent competition wherever it arose and in whatever form it arose. This included the destruction of independent mills or pre-emptive purchases of the production of organizations such as Anaconda Copper Company, for the specific purpose of keeping independent production "off the American market." (R. 675.)

3. Pursuant to the plan to destroy independent competition, the evidence showed that VCA and USV drove Wade and Curran out of business by a series of harmful acts.

As has been shown, petitioners were experienced operators and pioneers in the vanadium-uranium business.

(b) The Chronology of Acts of Injury and Harm

(i) The VCA Period

Mr. Charles Curran had originally assessed mining claims on the Colorado Plateau in 1916 to 1920. (Pl. Ex. 119; R. 1313.) In 1939, John F. Wade, Thomas F. V. Curran and H. R. Redington obtained two leases to mine carnotite ores on claims on the Navajo Indian Reservation. These leases were approved by the Department of the Interior in January and May, 1940, and covered five claims in the Carrizo Mountains: the Martin, Say-Tah, Eurida, No. 2, Sunnyside and Syracuse. (UC Ex. 84; R. 1431.)

They were interested in developing an oxide mill near the claims at Farmington, New Mexico and asked VCA for financing. (Pl. Ex. 118; R. 1309; 119; R. 1312.) Mr. Thomas Curran held a conference with Mr. Kett, in Pittsburgh, outlining the proposal. Mr. Kett, however, only offered to buy Curran's properties. (Id.) In 1941, VCA and Wade and Curran became competitive lessees on the Navajo lands. VCA acquired a lease on 960 acres of Navajo lands and sought to oust Wade and Curran from the area. (Pl. Ex. 121; R. 1318, 1322.) VCA's plan was to scheme with Redington, acquire the Redington interest in the partnership, unknown to Wade and Curran, and cause Wade and Curran to turn their interests over to VCA. The deal is set forth in Pl. Ex. 121, R. 1317, dated December 23, 1941, Mr. Kett, VCA's General Mining Superintendent to Garard:

> "Redington says that all of the money that has been spent on these claims has been spent by him. Neither Curran nor Wade have invested anything at all.

Therefore, Redington says that he proposes to sell these claims were and how he wants to sell them, and not through Curran and Wade. The idea now is for Redington to obtain an option from Curran and Wade on their interests, and then turn the whole thing over to us. I believe that if we can get these Redington Claims, together with what we may develop on our own leased land, we may have the nucleus of an operation in that area, the ore to go to Monticello. *Please don't say anything about this deal with Redington, since he is trying to get options from Curran and Wade before they get wise to the fact that he is dealing with us.*

I have gone into this matter with the Indian office in Washington, and there will be no trouble about the transfer of Redington's lease to us for cash, provided he can get rid of Curran and Wade."

Therefore, the plan called for Redington to deceive his partners by offering to buy from them without disclosing that the real purchaser was VCA. In other words, Redington and VCA conspired to defraud Wade and Curran as part of VCA's plan to "get rid" of them.

The fact that VCA and not USV, is dealing at this point, to acquire the Wade and Curran interests shows also the significance of the Dry Valley Agreement of September, 1941 as a division of territory agreement. (Pages 45 to 46, supra.)

However, to pick up the thread of the conspiracy within the conspiracy by which Redington was to deceive his partners for the profit of VCA, that attempt did not succeed. (Pl. Ex. 122; R. 1322.) The expectation, however, that the lands would somehow be taken away from

Wade and Curran remained. In this connection, a document from the files of VCA, written again to Kett in New York by VCA's Monticello Superintendent Garard reads as follows:

> "I am sure that Mr. Bransome will verify my statements in the past regarding the very likely possibility of those properties in question changing hands and eventually coming to the VCA, due to the fact that above mentioned parties are not living up to their contract—in fact, are in very poor standing with both the Government and the Indians.
>
> I am of the opinion that it isn't a matter of Redington sitting tight and holding these properties indefinitely, but very much inclined to believe that within the very near future, they will all be out of the picture." (Pl. Ex. 125; R. 1325.)

When VCA failed to obtain Wade and Curran's options, Redington, nevertheless, sold his interest to VCA, and VCA immediately wired Curran as follows under date of June 4, 1942:

> "Have purchased total Redington interest in Navajo Reservation carnotite mining lease of December fourth nineteen thirty nine and April fifth Nineteen forty and also loose ore stop. Will you please advise if you have made any arrangements to sell such loose ore and if so what they are furnishing us with copies of contracts if any stop. Hope you and Wade can arrange for early discussion with us of the future of this property." (Pl. Ex. 126; R. 1327.)

The Department of Indian Affairs refused to recognize the assignment of Redington's interest to VCA in September of 1942, following Curran's protest of the matter.

(Pl. Ex. 130; R. 1332.) Thus, only the intervention of the Department precluded VCA from neutralizing the Wade and Curran competition right at this point.

However, on or about the very day that VCA purchased the Redington interest, Thomas Curran wrote to Burwell of USV offering the ore from their claims for delivery to the Durango mill. In a document, which even the witness Hill said he could not explain (Pl. Ex. 123; R. 1321-1322), **BURWELL SENT CURRAN'S LETTER TO HIS SUPPOSED COMPETITOR, VCA.**

> "Grand Junction, Colorado
> June 5, 1942
> • • •
> Dear Mr. Kett,
> Attached is a copy of a letter Mr. Burwell received from Thomas F. V. Curran, 3507 Corona Street, Pittsburgh, Pennsylvania. He asked me to send this copy to you for your information."

VCA, attempting to oust Wade and Curran, was given a clear field by USV. When Wade and Curran turned to what it supposed was a competitive outlet, the competitive outlet surreptitiously turned over the information to VCA. In the light of the direct testimony in this case, indeed the confession of and the finding by the lower Court of the conspiracy to monopolize and to work together, the meaning of Plaintiffs' Exhibit 123 can have no other interpretation, and the verdict of the jury makes it mandatory that it be viewed in this light.

(ii) The USV Period

When VCA failed in its attempt to oust Wade and Curran by conniving with his Eastern partner, Redington,

USV moved into the picture. The fact that Burwell (USV) sent Curran's letter to Kett (VCA) showed again the continued maintenance by the parties of their Dry Valley agreement of September 1941, wherein Mr. O'Shea of the Carbide parent company recognized that VCA was to control the Utah-Arizona section of the Colorado Plateau. (See supra, page 46.)

Further collaboration between USV and VCA on Wade and Curran was shown at the meeting in 1942 between Burwell (USV), Kett (VCA, Sproul (MRC), Hill (USV-MRC), Edwards (MRC), and Viles (VCA). (R. 2017-2025.)

The treatment of Wade and Curran by USV-MRC became a decisive factor in the process of weakening Wade and Curran for final elimination.

During the period that Wade and Curran were shipping ore to Durango under the MRC contracts, they suffered grossly discriminatory prices. From May 27, 1942, to July 24, 1942, the USV-MRC contract provided for payment of 12¢ per lb. of 1.5% vanadium content. (Pl. Ex. 117, R. 1306.) This was the lowest price paid any producer or miner in this record. On July 24, 1942, the price was raised to less than 26¢ at 1.5% content. (Pl. Ex. 147, R. 1397.) On September 17, 1942, the price was set at 30¢ for 1.5% content. (Pl. Ex. 148, R. 1392.) As of May 21, 1943, a new contract was made which provided for 35¢ per lb. base at 1.5% content. (Pl. Ex. 149, R. 1392.) But VCA was guaranteed 39 cents per lb. for 1.5% ore in its contract of March 11, 1943, effective November 1, 1942, as to Navajo Indian properties and 48¢ per pound for 1.5% ore as to other areas. (Pl. Exs. 155, R. 1398; 156,

R. 1399.) Had Wade and Curran been paid on the basis of the VCA-MRC contract from the beginning, they could have operated successfully and retained their properties.

Wade and Curran, in debt over the MRC-USV contracts, invited Hill of MRC and an employee of USV to inspect the newly discovered Cove Mesa area in the Carrizo Mountains in confidence in the summer of 1943. Wade and Curran wished to obtain a loan for the development of the properties from MRC. They, of course, had to go to Mr. Hill who was employed by USV, agent for MRC. (Pl. Ex. 133, R. 1343.) Instead of exerting any effort to help Wade and Curran obtain a loan to finance the bidding for the Cove Mesa Leases, Hill cancelled the MRC contract with Wade and Curran on January 29, 1944. (Pl. Ex. 139, R. 1366.) Wade and Curran protested this cancellation. (Pl. Ex. 141, R. 1367.)

The MRC contract, however, contained a "duration" clause which provided:

> "The company reserves the right to cancel this contract without becoming liable for any damages to the Seller upon termination of the national emergency, as may be declared by the proper authority under the constitution and laws of the United States, or in the event the ores delivered by the Seller to it shall be found commercially unsuitable for treatment." (Pl. Ex. 149, page 5; R. 1392.)

But the cancellation was made with the specific knowledge that Wade and Curran were $3,000 in debt and had demanded that MRC honor the "duration" clause at least to allow them time to pay off the indebtedness. (Pl. Ex. 145, R. 1377.)

Petitioners urged in the Court below that implicit in the jury's verdict is the finding that the premature cancellation of Wade's MRC contract was pursuant to the plan to eliminate petitioners as part of respondents' overall conspiracy to monopolize on the following evidence: MRC directed USV to cancel the MRC ore contracts on December 11, 1943. (UC Ex. 85, R. 1433.) In cases where the right of cancellation was doubtful, USV was to send a copy of the contract with a proposed notice to MRC. This was December 11, 1943. As of January 31, 1944, the policy of MRC was to allow Wade and Curran to continue the MRC contract for the duration, pending the judgment of A. S. Hutchinson, Counsel for MRC. (Pl. Ex. 144, R. 1375.) As of February 24, 1944, Hill wrote to Mr. Hutchinson and told him that he would not accept delivery from Wade and Curran after February 28, 1944. (Pl. Ex. 145, R. 1377.) Thus, Mr. Hill has been caught in a difficult position. As of January 31, 1944, Mr. De Witt Smith of MRC stated that the cancellation of the Wade and Curran contract was a discretionary matter. (Pl. Ex. 144, R. 1376.) But at least two days prior to January 31, 1944, Mr. Hill had already cancelled the Wade and Curran contract. (Pl. Ex. 139, R. 1366.) Again, with respect to the request of Wade and Curran to work off the $3,000 by deliveries to MRC, Hill rejected the request on or prior to February 24, 1944. (Pl. Ex. 145, R. 1662.) But his final authority to do so, as claimed by respondents below in UC Ex. 87 (R. 1662) did not occur until March 10, 1944. Either Mr. John Hill was clairvoyant or he knew that Van Fleet and Burwell would arrange things as desired.

The learned Court below, however, found that the manner in which Wade and Curran's MRC contract was terminated was authorized by the Washington officials of MRC and therefore not within the scope of the conspiracy. There were, however, only two other operators outstanding who had a similar "duration of the emergency clause". Thus Mr. Hill wrote to Mr. A. S. Hutchinson, Counsel for Metals Reserve Company (Pl. Ex. 145, R. 1377-1378) in pertinent part:

> "Enclosed please find signed copy of an agreement of termination by mutual consent of the Claybaugh and Simpson Ore purchase agreement, dated December 12, 1942.
>
> With the receipt of this agreement, there are only three Ore Purchase Agreements remaining, of the type that *we do not consider we have specific rights of cancellation,* for which we do not have mutual consent termination agreements. You will recall that they are with G. J. Nielson, Utah Alloys Inc. and Wade, Curran and Company.
>
> Wade, Curran and Company is requesting our assistance in this payment of approximately $3,000 of unpaid accounts. These accounts are for mining machinery, supplies and expenses. They have requested that we allow them to deliver ore after February 28th in order to meet their obligations; however, they have been informed that no deliveries will be accepted after February 28th." (Emphasis added.)

But apart from the MRC, the other conspirator Mr. Bransome, President of VCA, interjected himself into the picture to make certain that Wade and Curran would feel that their chances of remedying the matter were

hopeless and futile. And rather than Page Edwards, the MRC agent, making certain that Wade and Curran understood that Bransome had no business intruding into the matter, Page Edwards did the opposite; he transmited a personal communication to Mr. Hill informing him of the meeting.

The memorandum from Edwards to Hill on February 4, 1944, reads as follows:

> "Wade and Curran were in today, not to see me, but to see Mr. Bransome and Denny [Viles]. They were quite put out regarding the whole matter and said they did not feel that their contract was subject to cancellation. Mr. Bransome is familiar with our general form and if their contract is on one of our O.P.A. forms Mr. Bransome felt that there was no question that the contract is automatically cancelled when we stop receiving ore. Evidently, their next move is to see Dan Melinskie in Cortez.
>
> All of this is merely to keep you posted as to your friends' activities." (Pl. Ex. 143; R. 1372-1373.)

The inability of Wade and Curran to get $3,000 at this juncture when USV's employees were the government agents through which this request was channeled is sharply to be contrasted with the fact that at the same time VCA secured from the government $3,145,355 to build a plant in the Peruvian Andes on the basis of a contract dated October 28, 1942. The plant actually was not completed until the war was over. It involved only vanadium and not uranium as was the case with the Wade claims, and VCA in 1946 purchased the plant built on their Peruvian properties for $500,000 within a year of its

completion at a cost of $3,145,355. (R. 1902, 2622-2624; 2711-2717.)

In another contrast, USV negotiated with VCA to give VCA the highest price for ore sales, resulting in payments of $1,300,000 from MRC for VCA's ore. (VCA Ex. 29; R. 2622.) Furthermore, MRC sold to USV and VCA vanadium oxide at $1.00 per pound although the market price was $1.10 per pound. (Pl. Ex. 23; R. 588.) This was an almost automatic 10¢ per pound profit plus a greater profit in connection with its manufacture into ferro-vanadium.

But the private plans of the respondents are shown to contemplate the ouster of Wade and Curran. The whole Wade episode is to be viewed in the light of the fact that in the fall of 1943 the private plans of Union Carbide contemplated the acquisition of properties, for their vanadium and uranium content, to protect the corporation. (See the revealing Pl. Ex. 230; R. 2414—Burwell to Van Fleet, October 1943; and also, as to VCA, Pl. Ex. 216; R. 2033.) The jury, under all of the evidence and in the light of the prior testimony of the admitted conspiracy to monopolize, could not help but view the activities of both VCA and USV against Wade and Curran as a simple carrying out of the primary objective of eliminating every outsider from the vanadium industry.

The evidence with regard to Wade and Curran then moves into the decisive phase whereby they lose their mining claims. When they were unable to get MRC help after devoting themselves to working for the MRC at Hill's price schedule, USV, as a private corporation, agreed to allow Wade and Curran $4,000, plus other

arrangements, in return for two-thirds of Cove Mesa (Pl. Ex. 153; R. 1396.) This was made not only after Hill had made a personal inspection of the properties in a confidential relationship with Wade and Curran, but after he had actually reported that the properties contained at least 15,000 tons of readily accessible ore. (Pl. Ex. 133; R. 1343.) At the time, of course, only Carbide knew of the uranium value of the properties. Wade and Curran did not. When Wade and Curran specifically asked Burwell why surveyors from Union Carbide's mines were on the property, Burwell falsely told them that the survey was being made for the Indian Office. (Pl. Exs. 134-135; R. 1343-1350.)

Thus by September 1943 USV held two-thirds and Wade and Curran one-third of the Carrizo Mountain property rights. (Pl. Ex. 153; R. 1296; Pl. Ex. 154; R. 1396.) There is next in this story, the acquisition of their one-third interest. This appears in Plaintiffs' Exhibit 138; R. 1361. This letter, written by Mr. G. Donald Emigh, an employee of USV, to R. R. Ridgeway, under date of March 22, 1944, concluded as follows:

> "As soon as we have satisfied ourselves concerning the ground to be purchased, its location, etc. we plan on taking immediate steps to purchase as authorized by Mr. Guarin, *because the present time seems to be a propitious one in which to act because of the fact that Curran Bros. & Wade have some $3,000 in outstanding obligations which they must meet.*" (Emphasis added.)

The series of crippling acts, beginning with VCA's connivance with Redington and ending with Wade and Curran's indebtedness after 2 years of selling ore to the MRC

under Hill's contract, culminates in executing what can best be described as a squeeze-play on Wade and Curran, after they had been reduced to a $3,000 indebtedness caused by their transactions with respondents. Wade and Curran in distress sold their remaining one-third interest in Cove Mesa for $12,500. (Pl. Ex. 138, R. 1361.) The papers were signed on April 17, 1944. (Pl. Ex. 151, R. 1395.)

These properties in due course were leased to VCA. VCA extracted from the Cove Mesa deposits (up to the date of the filing of the complaint) 24,000 tons of ore (R. 1401), containing 870,042 pounds of V_2O_5 and 108,974 pounds of U_3O_8. (R. 1402.) The total value of this tonnage was $695,881. The net value was $522,818.23. (R. 1402.)

The high point of the defense occurred with the appearance of General Leslie R. Groves on the stand. But General Groves testified that he would not have approved this transaction "unless the facts had been concealed from me." The interrogation on this phase of the case was as follows (R. 1596-1597):

> "Q. (By Mr. Alioto) Now, let me read it to you again, so we can have it, so the jury will have it clearly in mind what this is about. G. Donald Emigh, an employee of USV, wrote this letter, in which he states:
>
> 'As soon as we have satisfied ourselves concerning the ground to be purchased, its location, etc., we plan on taking immediate steps to purchase as authorized by Mr. Guarin, because the present time seems to be a propitious one in which to act because of the fact that Curran Brothers and Wade

have some $3,000 in outstanding obligations which they must meet.'

Now, was it any policy of yours, Mr. Guarin, that an attempt should be made to——

The Court. General Groves.

Q. (Mr. Alioto) General Groves, I'm sorry, that an attempt should be made to purchase the Wade and Curran properties on the basis of the fact that they were under financial obligations and therefore couldn't deal as effectively as otherwise?

A. I don't believe that any settlement made on that basis would have been approved by Mr. Guarin. If it had come to me, it would not have been approved unless the facts had been concealed from me. On the other hand, if the price had been fair it would have been approved.

Q. In any event, it was certainly no policy to deal with people on the basis of financial distress, I take it.

A. There was no policy to take unfair advantage of anyone, either American or foreign."

So far as Colonel Guarin's participation in the Wade and Curran transaction is concerned, it can be best characterized by Burwell's answer (R. 838):

"A. Yes, but we presented the plans and Paul Guarin, who was just a geologist, would say, 'Here, we better do this,' and he would say, 'I will fix up a letter to get it ready and we will create a plan for this whole business.'"

Thus, in summary, the facts show the following:

1. There existed an acknowledged conspiracy to monopolize the industry by eliminating independent competitors. This the jury and the Appellate Court below found to be

a fact. The Wade group was recognized as independent competition almost immediately, as evidenced by VCA's connivance with a partner "to get rid of Wade and Curran."

Burwell, Vice President of USV and a member of its Board of Directors, gave direct testimony that he was specifically instructed by his superiors to acquire all properties on the Colorado Plateau that could possibly produce vanadium in competition with USV in order to keep them off the American market and that his instructions were to acquire all the properties on the Colorado Plateau that could possibly produce vanadium in competition with the United States Vanadium Corporation. (R. 675.)

VCA likewise had the specific desire to eliminate Wade and Curran as troublesome outsiders who in December, 1941 had acquired Navajo leases. VCA desired the Wade and Curran properties to be "the nucleus of an operation in that area, the ore to go to Monticello." (Pl. Ex. 121, R. 1318.)

2. USV gave VCA a clear field to eliminate Wade and Curran pursuant to the Dry Valley settlements which apportioned that area of the Plateau to VCA.

3. When Curran tried to get competition so as to deal with someone other than VCA, he wrote to USV offering to sell his ore for processing in the Durango plant, and *all USV did with his letter was to surreptitiously turn it over to VCA*, confirming the collaboration between the two.

4. Simultaneously with this effort, USV in its MRC contracts gave Wade and Curran disproportionately low

prices as compared with the first price negotiated with VCA. That is, the jury's verdict had implicit in it the fact that USV used its MRC powers to discriminate in prices between Wade and Curran and VCA for the purpose of building up the one and tearing down the other. In relation to Mr. Nisley the Court below found that USV had utilized its MRC agency against Nisley to further the basic conspiracy between respondents.

5. When Wade and Curran, in confidence, showed Hill their highly mineralized discovery in the Carrizo Mountains, Hill actively connived with Burwell to take the deposit away from Wade and Curran and ultimately did. USV, in the final analysis, used Curran's distress indebtedness of $3,000 as a means of getting them to sell out for $12,500, and VCA and USV caused this indebtedness.

In fixing the damage, the jury was aided not only by the actual tonnage recovered from the same deposit when VCA took over the deposits, but by the following factors as well:

1. The confidential report of Hill setting out his estimates of tonnage.

2. The report of Hill setting out the mining conditions in the area.

3. The price actually paid by USV or by the Manhattan District for other properties on the Plateau.

4. All of the economic factors of the vanadium industry.

5. All of the economic factors of the uranium industry.

6. The defendants' books and records with respect to production, manufacture, and distribution of vanadium and uranium.

7. Costs of production in the business of mining, producing and distributing vanadium and uranium.

8. Profits made in the production, manufacture, and distribution of vanadium and uranium.

The jury had before it the detailed reports as to the Carrizo Mountain claims. (Pl. Ex. 132, R. 1338; Pl. Ex. 133, R. 1343.) Thus the potentials and known valuations of the properties were fully known in 1943 and 1944 and the market values as of 1944 were before the jury. In October, 1943, Mr. Burwell had recommended to Union Carbide that it buy the North Continent properties for $450,000. (Pl. Ex. 230, R. 2414.) A short time later he made a formal report to the Army (UC Ex. 37; R. 853) in which he suggested that the same properties be purchased for $200,000.

D. THE OPINION BELOW

Despite the admission of purpose and intention to exclude Wade and Curran and the evidence of discrimination and harm practiced by respondents on Wade and Curran, the Court below held as a matter of law that the evidence could not support the jury verdict and judgment since the acquisition of the Wade and Curran mining rights was performed under the direction and control of the United States Army through the Manhattan District.

The Court below reached this conclusion despite a jury verdict to the contrary and the following:

1. The evidence was undisputed that during the period 1940 to 1944 Wade and Curran were financially weakened by the combination to exclude them.

2. The loss of their mining rights and their inability to proceed as an independent mining company was directly attributable to the manner in which VCA first and then USV and USV, agent for MRC, dealt with the Wade and Currans.

3. The principles of free enterprise ruled the disposition of valuable mining claims during the period 1942 to 1944 and those that were in sound financial condition held on to uranium properties, no matter how valuable or useful they may have been to the United States or the Manhattan District.

4. The Manhattan District did not exercise eminent domain powers but simply acquired properties as free market buyers.

5. VCA held extensive properties on the Navajo Lands from which the Manhattan District could have explored.

6. The Cove Mesa claims were discovered by petitioners and disclosed to Mr. Hill, USV, and the values obtained by this discovery are directly attributable to petitioners.

7. The plan to acquire the Wade and Curran mining claims originated with Mr. Van Fleet of USV, and was proposed by him to the Corps of Engineers.

8. Colonel Guarin did not seek the approval of the head of the Manhattan District, General Groves, on the Wade and Curran transaction.

9. General Groves testified he would not have approved the transaction.

10. It was against the directives of General Groves to acquire properties based on the financial distress of

citizens; yet this was done here. There is no dispute that the mining claims were acquired because of the financial distress of the Wade and Currans, a financial distress in which respondents placed them as a result of their admitted conspiracy.

11. The respondents VCA and Union Carbide kept all their uranium lands and mining rights free from acquisition by the Manhattan District.

12. The applicable governmental contract provisions provided that Union Mines was to act in "good faith", which was shown not to have occurred here.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE HELD THAT THE ANTITRUST LAWS AFFORD REDRESS FOR HARM PROXIMATELY CAUSED BY CONSPIRACIES TO MONOPOLIZE AND A JURY VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE OF VIOLATION HAVING A NATURAL TENDENCY TO CAUSE INJURY CANNOT BE REVERSED

A. The decision below is in direct conflict with the doctrine of proximate cause applied in antitrust cases by this Court in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)

This petition presents issues which are allied and similar to those in the case of *Continental Ore Company v. Union Carbide and Carbon Corp., et al.*, No. 304, now pending before this Court. This case presents the issues wherein respondents claim immunity under the antitrust

laws, without benefit of a certificate of immunity, on the basis that admittedly illegal acts were performed under governmental sanction. If petitioners in the *Continental Ore* case now pending before this Court are correct, then petitioners herein have been deprived of a verdict awarded them by a jury in the amount of $600,000 even though respondents were found to have conspired to eliminate petitioners from the vanadium business.

The application of the doctrine of proximate cause is in issue in this case, as it is in the *Continental Ore* case now pending before this Court. The Court below conceded and found that respondents had as their intention the complete monopolization of the vanadium industry pursuant to a conspiracy to monopolize. And it is elementary that "results intended by an actor are proximate if they in fact take place." McLaughlin, *Proximate Cause*, 39 Harvard L. R. 149, 151 (1925). The specific results intended by these conspirators were found to have occurred by a jury and the Court below. Yet the Court granted them immunity without benefit of a certificate of immunity.

The trial Court in the instant case instructed the jury:

> "Now, we come to Wade and Curran. If the defendants—we're still talking about damages—if the defendants conspired to gain control and domination of the vanadium industry and pursuant to that plan or program defendants were able to acquire and did acquire property of the independents as the proximate fruits of that conspiracy, the plaintiffs Wade and Curran may be found to be injured by such acquisition and would be entitled under the antitrust laws to be compensated, *if you find by a preponderance of*

the evidence that the acquisition was pursuant to that conspiracy." (Emphasis added.) (R. 3193-3194.)

The jury so found. The Court below agreed. Yet, the Court below reversed the judgment in favor of petitioners and granted them immunity.

A successful party may sustain its judgment on appeal on any ground that finds support in the record. *Jaffke v. Dunham*, 352 U.S. 280 (1957).

To sustain their judgment petitioners were entitled to the resolution of all factual conflicts, presumptions and inferences, and under such rules of appellate procedure, it must be concluded that the jury found that the proximate cause of petitioners' inability to retain their valuable mining claims and Union Mines' acquisition of these claims was the direct and intended result of the conspiracy to exclude petitioners from the market place.

With just the slightest variation in two words, the language of *Twentieth Century-Fox F. Corp. v. Brookside Th. Corp.* (8 Cir. 1952), 194 F. 2d 846 is completely descriptive of the elimination of petitioners:

> ". . . and that concerted action on behalf of the defendants had the effect of making it impossible for plaintiff successfully to operate its picture theater [mining claims] and in effect drove it out of business, forcing it to sell to a corporation controlled by or participating in the conspiracy or combination created by defendants." (850.)

The manner in which confessed violators of the anti-trust laws inflict their harm on a private business is immaterial once it is conceded that the conspirators and

antitrust violators intended that particular harm to occur. The fact that other forces, even governmental forces, are used as a means to accomplish the combination's purpose of elimination after years of impact from the combination has left its mark is immaterial. Antitrust violators are held responsible for all results they intended to accomplish by their illegal activities.

As stated by Restatement Torts, §915:

> "A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it was expectable, except where the harm resulted from an outside force, the risk of which was not increased by the defendant's act."

In the instant case, respondents intended to acquire petitioners' property and to eliminate them from the vanadium industry pursuant to their overall conspiracy to monopolize this industry. Respondents intended that petitioners lose their properties; intended to exclude them from the vanadium industry. After more than four years of oppression, they were forced to leave the Colorado Plateau with their valuable mining discoveries and rights lost to Union Mines, a wholly owned subsidiary of Carbide, one of the respondents herein, although *no other individuals* lost their mining rights to Union Mines. The financial weakening of the petitioners through deliberate acts of the respondents committed pursuant to respondents' conspiracy to monopolize the vanadium industry was the specific reason for their elimination from the vanadium-uranium mining business and the loss of their valuable mining properties. Respondents were the substantial

factors in causing that financial weakening and petitioners' demise.

Under applicable antitrust and tort principles, respondents are liable to petitioners, in an antitrust conspiracy action, for the results they intended to produce and which were found to have been in fact caused and brought about by respondents' direction and programs.

Hetzel v. Baltimore & O. R. Co., 169 U.S. 26 (1898);

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946);

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931);

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927);

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948), *on remand* (9 Cir. 1952) 195 F.2d 622.

In the instant case, two salient factors are to be kept in mind: (1) Respondent-conspirators created the very conditions responsible for the loss of the claims—the financial distress of Wade and Curran. Admittedly, beyond dispute and found to be true as a question of fact by the jury verdict in petitioners' favor, petitioners would not have been the object of any action or proposal on the part of Union Mines, the wholly owned Union Carbide subsidiary, but for petitioners' financial distress. (2) Even assuming Union Mines was directed by the Manhattan District, such governmental intervention was not an independent, superseding force because the intervention was *admittedly* brought about by the active work of Van Fleet (USV), Burwell (USV), Bransome (VCA)

and Hill (USV), all working for the private interests of Union Carbide and VCA. The ⅔-⅓ "subdeal" was made in the name of USV before anyone in the Corps of Engineers knew of it. (R. 1620-1621; 1338-1342.)

Since the evidence was substantial to show that the conspiracy financially weakened Wade and Curran, the conspiracy is liable for all consequences reasonably within its contemplation. The loss of these mineral rights by petitioners was not only within the reasonable contemplation of the parties, *this loss and this intended result was the specific purpose of the combination.*

The evidence showed that, in 1940, VCA planned that Wade and Curran leave the area of their operations. (Pl. Ex. 121; R. 1317.) It induced Redington to leave the Wade and Curran venture at the time VCA took over competitive lands on the Navajo Reservation. (Id.) And finally Bransome, VCA's president, told petitioners that their protest to MRC would be futile. (Pl. Ex. 143; R. 1372.)

As for USV, the evidence is clear that intended and well planned discriminations practiced against petitioners by USV as agent of MRC from May, 1942, to 1944, as part of the conspiracy to monopolize the vanadium industry, accounted for the financial distress which led to petitioners' elimination from the vanadium industry, just as respondents' conspiracy intended.

The blatant fact is that petitioners were paid grossly depressed and grossly discriminatory prices by USV as agent for MRC at the same time USV as agent for MRC was paying its conspirators high prices for the same ore. The Court below has allowed Wade and Curran, as one

of the individual producers in the *Balsley* miner's case, to obtain the difference in price between the price they were paid by USV-MRC and the jury fixed price of 50 cents a pound on the basis that they were injured as a result of the price fixing which was a part of the conspiracy.[27] This 50 cents price was the price that USV-MRC could have paid the miners without MRC approval (UC Ex. 4, R. 773) and was the competitive price the jury found that petitioners would and should have received but for respondents' conspiracy to fix prices. This amounted to $18,661.69. (R. 410.)

It is beyond dispute that Wade and Curran were the subjects of severe discrimination, since at the time petitioners were receiving these low prices, VCA was obtaining payments of 48 cents a lb. for 1.5% ore for Area No. 1.

As the opinion below states, Appendix A, p. 28:

> "One of the negotiated purchase contracts was between USV as agent for MRC and VCA, dated March 11, 1943, providing for the payment of 48¢ per pound, plus hauling allowances for 1.5 percent ore.[5]
>
> [5]Under this contract, VCA sold and delivered to USV, as agents for MRC, 74,322 tons of 1.5% vanadium ore, or 2,229,000 pounds of V_2O_5 for which VCA received $1,333,725."

If petitioners had similarly received this higher price, they would have received an additional $15,000 or $12,000, and would not have been in the financial distress which

[27]5/27/42-7/24/42: 12 cents per lb at 1.5% content
7/24/42-9/17/42: 26 cents at 1.5% content
9/17/42-5/21/43: 30 cents at 1.5% content
5/21/43-2/44 : 35 cents at 1.5% content

forced them to sell their mining rights to Union Mines, Carbide's subsidiary.

The evidence further showed that Van Fleet and Hill, both USV officials, were the persons who directed the acts which caused the financial condition of petitioners and then took advantage of the condition they had caused to eliminate petitioners by presenting plans to the Manhattan District.

We respectfully urge that the jury verdict in favor of petitioners must be sustained on the ground that respondents were the proximate cause of petitioners' elimination from the vanadium-uranium mining and milling business and that but for the illegal practices of the respondents-conspirators in violation of the antitrust laws, petitioners would have retained their valuable mining discoveries worth well over $200,000 in value.

B. The decision below conflicts with the decisions of this Court that private parties may not use Government agency powers as a cloak to exclude others from the market or to conspire or discriminate against others

Just as respondents cannot use the fact that petitioners' properties were purchased by Union Mines for the Manhattan District as a means of avoiding liability for the intended results of their conspiracy, neither can respondents use the excuse of "government agency" to obtain the slightest sort of antitrust immunity. No certificate of immunity was granted to or even applied for by respondents.

No directions to violate the antitrust laws were given to respondents by the government. No authorization of any type whatsoever was given to respondents to violate

the antitrust laws. In fact the evidence was to the contrary. The evidence showed without contradiction that the government directed and *required* respondents to act in good faith and to be liable under any and all federal and state laws for their activities as government agents. Most significantly the evidence showed no governmental direction to conspire or agree or to monopolize. Rather, it showed conclusively that respondents used and breached the trust given them by the government to further their conspiracy and to screen their elimination of petitioners' mining business for their private purposes and gain.

Union Pac. R. Co. v. United States, 313 U.S. 450 (1941);

United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940);

Floyd v. Gage (4 Cir., 1951), 192 F.2d 137;

Bankers Life & Casualty Company v. Larson (5 Cir., 1958), 257 F.2d 377;

Crummer v. Du Pont (5 Cir., 1955), 223 F.2d 238 *cert. denied* 350 U.S. 848.

We respectfully submit that substantial evidence was before the jury which permitted it to draw the following conclusions, which conclusively disallow any judicial grant of antitrust immunity to respondents:

1. Respondents' conspiracy and the plans and programs which were designed to implement that conspiracy and to eliminate petitioners from the vanadium industry were formulated and put into effect prior to the advent of the government's need for uranium.

2. The existence of respondents' conspiracy to monopolize the vanadium-uranium business was not known to

any of the persons in the government who were in charge of the government programs. And respondents made every effort to prevent these officials from knowing these plans. The evidence was uncontradicted that none of the following officials were aware of respondents' conspiracy or their illegal intentions: General Leslie Groves (R. 1592, 1597-1598); Col. Paul Guarin (R. 1633); Major Merritt (R. 1749); J. K. Gustafson (R. 1820-1826.)

3. The actual formulation of the plan to acquire petitioners' property came from Van Fleet of USV and could only be the result of Mr. Hill's investigations of petitioners' discoveries at their confidential invitation. (Guarin, R. 1618; Hill, R. 1333-1348; Pl. Exs. 133, 134, R. 1343, 1349.)

4. The formulation of the plan to acquire the Wade and Curran mining rights came after Union Carbide had received specific knowledge of the potential value of uranium and had determined, as part of the conspiracy, to acquire all promising uranium properties on this Plateau so as to consummate their plans for a total monopoly. By 1943, of course, both VCA and Union Carbide knew of the government's need for uranium oxide. On June 25, 1944, Mr. Viles, the VCA General Superintendent, wrote to his superior, Mr. Bransome, President of VCA:

> "I am grabbing all of the vanadium claims possible on a lease basis, first figuring what the ore will cost us in Naturita regardless of distance, as mining costs have to be governed by the long haul. At present I am tying up the roscoelite claims owned by the Dunnings near Rico, Colorado, for whoever operates the Durango Plant in the future can use this ore. Please correct me if I am wrong in trying to control

as many outside vanadium claims as possible on a lease basis without obligating the company financially." (Pl. Ex. 216; R. 2033.)

On March 21, 1944, Viles had written to Bransome that VCA should acquire property around the Monticello plant.

". . . if only to prevent some outsider getting ideas in regard to the Monticello plant." (Pl. Ex. 36; R. 710.)

On October 21, 1943, Burwell (USV) had written to Van Fleet, Rafferty and Halliday, his superiors, that "with a situation developing in which uranium promises to become the valuable element" Union Carbide should acquire properties "to protect the corporation in its future business in vanadium and uranium." (Pl. Ex. 230; R. 2413-2416.)

In March, 1944, Union Carbide determined to acquire the Durango Government Mill from MRC specifically to prevent "the injection of additional operators in the field". (Pl. Ex. 137; R. 1358.) The letter stated:

"Durango would, furthermore, be the logical place to treat the Uranium ores of the Navajo Indian reservation, as well as those from the McIntyre Canon sector." (Id. R. 1360.)

The evidence showed unmistakably and beyond a doubt that the actual formulation of the plans to acquire petitioners' uranium properties came from companies which sought control of uranium as well as vanadium as part of the conspiracy. These plans originated with defendants, not with the Manhattan District.

5. Respondents' exclusionary policy and purpose to monopolize the vanadium-uranium industry was strictly a private affair which utilized the government agencies to serve their private conspiracy.

In December, 1943, Mr. Nisley, of the independent Nisley & Wilson Mill, after being allowed to visit the Uravan plant by the United States Army, succeeded in working out a process to extract uranium. (R. 1181-1183.) When he reported it to the Army, he "ended up in an office with Mr. Burwell". (Nisley R. 1182.) At that time Burwell told him "I won't permit you to get into the uranium business." (Nisley R. 1183.) Mr. Nisley never did get into the uranium business.

Also indicative of the private purposes of this conspiracy was the evidence that as early as October, 1942, when Burwell, an official of MRC at the time, was apprehended diverting miners away from the Nisley-Wilson independent mill, he summoned Mr. Gardner, one of the operators to his office. (R. 1284.) Burwell thereupon told Gardner that he did not want him to operate the independent mill. (R. 1284.) When Gardner protested that with a war going on, the United States government, which was in dire need of vanadium, would not permit him to close an independent mill, Burwell told him: "I AM THE GOVERNMENT". (Gardner R. 1285.)

And in January, 1943, when Mr. Nisley protested to Hill, another USV officer assigned to the MRC agency, about the long delay in executing his MRC contract, Hill told him:

> "Regardless of what the War Production Board said or what Metals Reserve Company said, my salary is paid by the United States Vanadium Corporation and *they tell me how this is to be handled.*" (R. 1176.) (Emphasis added.)

6. The officers and employees of Union Carbide and VCA were the technical specialists in vanadium and uranium properties and in the production of vanadium products and uranium sludge. The evidence was overwhelming that Van Fleet, Burwell, Bransome, and Viles were the key advisors to the governmental agencies. They were the men with practical experience who were advising the agencies. Respondents were shown to be the originators of schemes and the activities involving competitors and the agencies' relations with the miners.

Mr. Hill, the USV-MRC, Union Mines and USV employee, took his orders directly from Burwell. (R. 1293-1295.) Page Edwards of MRC, clearly took directions from Burwell. (Pl. Ex. 185, R. 1557, 1558.)

Col. Guarin had no experience whatsoever in the vanadium industry. (R. 1631.) Col. Guarin was explicit (R. 1602):

> "We had to turn to civilian organizations and contract this work out to get the staff and qualified people needed to carry out such a project, and I think that is the reason it was contracted. I don't see how it could be done any other way."

Major Merritt testified concerning his negotiations for uranium oxide with the respondents. (R. 1715-1717; 1725-1728; 1743-1744.)

Capt. Leahy, the area engineer for the Guard Central Office for the Manhattan District, had no experience in vanadium and uranium. (R. 2101.) His consultant was Blair Burwell. (R. 2102; see testimony of Mr. Nisley at R. 1180-1183.)

Mr. Gustafson flatly admitted that his knowledge of the vanadium industry came from the two respondents. (R. 1820.) The only informed men were Van Fleet, Burwell, Viles, Bransome, and a Mr. B. Webber, one of the employees of Union Mines, the wholly owned Carbide subsidiary. (R. 1820-1821.) And they were advising and directing the government people in their activities.

7. The elimination of petitioners was clearly consistent with the proven objective of the overall conspiracy between respondents, the acquisition of all vanadium mills and claims, the preventing of "outsiders" from challenging this monopoly and the exclusion of all competition. (Pages 32 to 41 of this Petition.)

8. In assuming that the Manhattan District required petitioners' properties to gain access to the Navajo Reservation for the purpose of conducting extensive surveying the Court decided a question upon which there was a factual conflict and which was a question of fact for the trier of fact. VCA's Navajo leases remained intact and, if desired, VCA properties could have been used as the springboard for surveying, even if the simple intervention of the Bureau of Indian Affairs could not have solved the problem. Col. Guarin could not really explain this. (R. 1624-1627.) Thus the question remains why the two conspirators, VCA and Union Carbide, were allowed to retain their uranium holdings and mineral leases while

private citizens like Wade and Curran were so handled by the agencies being administered by these conspirators that they were required to leave the vanadium-uranium industry? The answer seems clear enough. The evidence showed that respondents' conspiracy had as its objective the acquisition of all vanadium-uranium properties consistent with the common plan drawn in 1933. The government agencies were available to them as means of accomplishing their intended result and they used them for this purpose.

It is respectfully submitted that the learned Court below was in error in holding that the jury could not have concluded from the evidence here that petitioners' discoveries and mining rights were acquired pursuant to the private conspiracy entered into by respondents many years prior to 1944, which conspiracy was implemented by respondents' use of the MRC and Union Mines agencies as instruments to achieve the objectives of their overall conspiracy to monopolize and exclude competitors or potential competitors. The record here is too blatant with antitrust violations to allow judicial exemption of respondents from the antitrust laws.

C. Private corporations are liable for conspiring to eliminate a competitor regardless of the means used. The fact that they use a governmental agency to accomplish or complete this result does not immunize them

1. The decision below conflicts with the decisions of this Court that antitrust immunity or exemption will not be implied or inferred and that even if granted must be specifically limited to the scope of the exemption granted

It has long been established that immunity from the antitrust laws will not be created by implication, but

rather that there must be a specific grant of immunity. *United States v. Borden Co.*, 308 U.S. 188 (1939); *Maryland & Virginia Milk Pro. Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Radio Corporation of America*, 358 U.S. 334 (1960). "We cannot believe that Congress intended to create so great a breach in historic remedies and sanctions." (Ibid., 308 U.S. 188, 198.)

As stated in *United States v. Borden Co., supra*, "If Congress had desired to grant any further immunity, Congress doubtless would have said so." (p. 201.) And again in *United States v. Socony-Vacuum Oil Co.* (1940), 310 U.S. 150, "For Congress had specified the precise manner and method of securing immunity. None other would suffice." (310 U.S. 226-227.) Whenever Congress has desired to grant immunity, it has specifically stated so and has provided the machinery to invoke such immunity.[28]

Furthermore, when Congress has granted immunity, it has specifically limited the immunity to the *exact* conduct described and the Courts have so construed the grants of

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[28]For example, see the following: Agricultural Adjustment Act of 1933, Sec. 8(2); 48 Stat. 34; as amended see 7 U.S.C. Sec. 608b; Agricultural Adjustment Act Amendment of 1935, Sec. 57; 49 Stat. 781; Capper-Volstead Act, Sec. 2; 42 Stat. 338; 7 U.S.C. Sec. 291; The Interstate Commerce Act, Sec. 5a; 62 Stat. 472; 49 U.S.C. Sec. 5b; Federal Aviation Act of 1958, Sec. 414; 72 Stat. 770; Communications Act of 1934, Section 313; 48 Stat. 1087; Webb Export Trade Associations Act, Section 2; 40 Stat. 517; Atomic Energy Act of 1954, Sec. 105; 68 Stat. 938, 42 U.S.C. Sec. 2135 (the Act of 1954 amends and supersedes that of 1946 which contained substantially similar provisions. Both Acts *specifically* provide for antitrust liability); Small Business Mobilization Act of June 11, 1942, Sec. 121; 56 Stat. 357; Small Business Act of 1958, Sec. 11; 72 Stat. 394; Defense Production Act of 1950, as amended, Sec. 708(b); 69 Stat. 581, 50 U.S.C. App. Sec. 2158.

immunity. *Atchison, Topeka & S. F. Ry. Co. v. Aircoach Transport Ass'n.* (D.C. Cir. 1958), 253 F.2d 877, *cert. denied,* (1960) 80 S.Ct. 372.

Similarly, as stated by this Court in *Maryland & Virginia Milk Pro. Ass'n. v. United States, supra,* the full effect of the immunity provision involved was that although a group of farmers acting together could not be restrained:

> "... 'from lawfully carrying out the *legitimate objects* thereof' (emphasis supplied), ... the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. (Cases cited)." (pp. 465-466)

2. A private corporation is not immune from the antitrust laws because it has an agency agreement with the government if it unlawfully uses its agency powers to violate the antitrust laws

Private corporations such as Union Carbide and VCA are not immune from the antitrust laws if they conspir to viol. te the antitrust laws, and if, as part of that conspiracy, they unlawfully use an agency agreement which one of their subsidiaries has with the government, to eliminate a competitor. Private corporations which undertake, through subsidiaries or otherwise, to assume certain functions as agencies of the government are themselves responsible for their own tortious conduct when that conduct conflicts with the antitrust laws. *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transport Ass'n.* (D.C. Cir. 1958), 253 F.2d 877, cert. denied 361 U.S. 930 (1960); *State of Georgia v. Pennsylvania,* 324 U.S. 439 (1945); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *Kobe, Inc. v. Dempsey Pump Co.* (10 Cir. 1952), 198 F.2d

416, cert. denied 344 U.S. 837 (1952); *Bankers Life and Casualty Company v. Larson* (5 Cir. 1958), 257 F.2d 377; *Floyd v. Gage* (4 Cir. 1951), 192 F.2d 137; *Crummer Co. v. Dupont* (5 Cir. 1955), 223 F.2d 238, cert. denied 350 U.S. 848; *United States v. Deutsches Kalisyndikat Gesellschaft* (S.D. N.Y. 1929), 31 F.2d 199.

In the *Atchison, Topeka* case, *supra*, the Court held that even though it should be found that the agreements involved therein were within the immunity section and an antitrust immunity certificate obtained, they nevertheless would be held as violations of the antitrust laws *if the agreements were part of a plan of the defendants in combining or conspiring to eliminate the competition of plaintiffs.* The Court held:

> *"Even though it should be found in the end that the practices as such have been validly immunized by section 5a approved agreements, nevertheless, if they are part of an effort by Railroads in combination or conspiracy to eliminate the competition of Aircoach, rather than used merely to meet that competition, the practices would be removed from the protection of section 5a(9)."* (p. 887)

Again, in *United States v. Deutsches Kalisyndikat Gesellschaft*, supra, which was an antitrust case, the Court held (p. 202):

> "Nor can immunity be claimed by the defendant corporation, or on its behalf, or by or on behalf of any of its officers, agents, or employees, on the ground that they are acting as agents of a foreign government. *An agent does not cease to be answerable personally for his illegal acts because he is an agent, even though he may be an instrumentality of govern-*

ment. Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corp., 258 U.S. 549, 567, 42 S.Ct. 386, 66 L.Ed. 762. . . ." (Emphasis added.)

Legal means may not be used to accomplish an illegal objective. (*American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, supra.) And if a combination or conspiracy taken as a whole violates the antitrust laws, it is not purged of its unlawfulness just because part of it may be valid. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *American Tobacco Co. v. United States* (6 Cir. 1944), 147 F.2d 93; *Aikens v. Wisconsin*, 195 U.S. 194 (1904).

That a person cannot use lawful activity in an unlawful manner for an unlawful purpose and for an unlawful end and still have antitrust immunity was again reiterated in *Maryland & Virginia Milk Pro. Ass'n. v. United States*, *supra.* The Court held the conduct complained of constituted anticompetitive activities so far outside the "legitimate objects" of a cooperative that, even if proved, it would constitute a clear violation of Section 2 of the Sherman Act.

In *United States v. Griffith*, 334 U.S. 100 (1948), this Court held (p. 107):

> "It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor, is unlawful."

The contract between Union Mines and the Corps of Engineers involved in the case at bar is not a general certificate of immunity. Even assuming *arguendo* that the

contract can be construed to grant immunity for some of respondents' acts, it must be construed according to the specific purposes of the Manhattan District and the specific allowances granted in the contract.

Obtaining properties containing uranium bearing ores was clearly not an "emergency". In 1943-1944, the bulk of uranium ores came from foreign countries. The government obtained only a small amount (10%), from the Colorado Plateau. (R. 1582.) No substantial amounts of uranium bearing ores were acquired by the Manhattan District. (R. 1582.) Uranium bearing tailings were acquired rather than ore. (R. 1582.) Thus it is clear from the evidence that there was no great need for uranium bearing ore lands, but rather, that the government was essentially interested in tailings. The tailings, of course, had been accumulated by respondents over a period of many years from their vanadium oxide milling operations.

Further, the Manhattan Project expected Union Mines to "explore" and "discover" as the primary aim. The learned Court stated below:

> "The evidence is undisputed to the effect that Manhattan instructed USV-Union Mines to gain access to the Navajo Reservation for the purpose of conducting extensive explorations for uranium on a large area." (Appendix A, p. 79.)

We respectfully submit that respondents have erroneously been given antitrust immunity as to an exclusionary purchase when the scope of their governmental activities did not involve "purchase" for the purpose of such private exclusionary plans. But even if governmental immunity attached to the Union Mines contract with the

Corps of Engineers it would be limited only to acts performed in "good faith". (UC Ex. 17, R. 797.) This record shows that respondents were not in "good faith", for they had embarked upon and carried out an exclusionary conspiracy, and their acts as government agents were directed toward that end. Further, it was beyond the scope of the Manhattan District's policies and directives to utilize financial distress as the means of obtaining a private citizen's property. As General Groves testified:

> "Q. You didn't instruct them, did you, General, to take advantage of anybody's financial situation to pay a lower price than the claim was worth?
>
> A. I instructed them just as I told you, fair to both sides." (R. 1594.)

We respectfully urge then that the record shows conclusively that petitioners' elimination by respondents was in "bad faith" and contrary to the policies of General Groves. This exclusion was not necessitated by urgent war time emergency. The learned Court permitted respondents an exemption far beyond any legitimate allowance that may be contained in the contract between Union Mines and the Corps of Engineers.

D. The decision below conflicts with a just and reasonable interpretation of the record as required by this Court in Story Parchment Co. v. Paterson Parchment Paper Co.

The learned Court below distinguished petitioners' action from the Nisley action on the premise that in Wade and Curran,

> ". . . they lacked the power to commit the acts of which they are accused because of the positive intervention of governmental action." (Opinion, Appendix A, p. 81.)

But we respectfully submit the record does not support this conclusion. The Wade and Curran transaction did not have the approval of General Groves. He testified that if the Wade and Curran matter had come to him, he would not have approved it. General Groves testified:

> "Q. Now, was it any policy of yours, General Groves * * * that an attempt should be made to purchase the Wade and Curran properties on the basis of the fact that they were under financial obligations and therefore couldn't deal as effectively as otherwise?
>
> A. I don't believe that any settlement made on that basis would have been approved by Mr. Guarin. If it had come to me, it would not have been approved unless the facts had been concealed from me. On the other hand, if the price had been fair it would have been approved.
>
> Q. In any event, it was certainly no policy to deal with people on the basis of financial distress, I take it.
>
> A. There was no policy to take unfair advantage of anyone either American or foreign." (R. 1596, 1597.)

As to Colonel Guârin, the jury had before it positive evidence that Burwell testified that Col. Guarin was an individual who would merely approve the plans formulated by Burwell. Burwell testified:

> "A. Yes, but we presented the plans and Paul Guarin who was just a geologist, would say, 'Here, we better do this,' and he would say, 'I will fix up a letter to get it ready and we will create a plan for the whole business.'" (R. 838.)

Thus, the jury could reasonably conclude, as it did, that petitioners' elimination originated with the conspirators. The learned Court below was required to support the

judgment by giving petitioners all inferences and presumptions and it could not adopt an approach inconsistent with such an interpretation of the evidence. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946).

E. The action of the Court below in reversing the jury verdict and judgment in favor of petitioners violates the rule that resolution of questions of fact are for the trier of fact and not an Appellate Court

Respondents were entitled to a reversal of the judgment entered upon the jury verdict in the Trial Court only if not supported by substantial evidence, giving to petitioners the benefit of all conflicts in the evidence and all the presumptions and inferences that could reasonably be drawn from the evidence, considered in the light most favorable to petitioners. *Gunning v. Cooley*, 281 U.S. 90 (1930).

The action of the Trial Court in reversing a jury verdict on the basis that the United States government directed all respondents' acts in relation to petitioners is in direct conflict with this rule and with this Court's opinion in *Beacon Theatres, Inc. v. Westover*, 395 U.S. 500 (1959) which states that the "maintenance of a jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In effect, the Court below deprived petitioners of a trial by jury contrary to the Seventh Amendment of the Constitution.

Appellate Courts are not to search the record to take cases away from the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943); *Ellis v. Union Pacific Ry. Co.*, 329 U.S. 649 (1947); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

As stated in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1943) by Mr. Justice Murphy:

> ". . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury; it is for the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions, that which it considers most reasonable . . ."

The right of the jury to select from conflicting inferences and conclusions that which it considers most reasonable is a right which cannot be ignored, whether it relates to causation, impact, damages or any other issue which is in conflict. *Tennant v. Peoria & P. U. Ry. Co., supra* at 321 U.S. 35; *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959).

In *Stone v. New York, Chicago & St. Louis R. Co.*, 344 U.S. 407 (1953) this Court stated:

> "The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury."

The issue as to whether respondents where acting pursuant to a private conspiracy or under directions by the government was strictly a factual one. At the trial, petitioners claimed that they were the victims of an overall conspiracy to monopolize the entire vanadium-uranium industry. Respondents denied this and claimed that they were acting under directions from the government. Thus, the issue was a factual one which was presented squarely to the jury pursuant to the Court's instructions: Did defendants conspire to monopolize and was that conspiracy the proximate cause of the loss of petitioners' property rights and elimination.

The Honorable Court below simply analyzed the entire record and made its own factual finding on this issue. A reading of this brief and of the Court's opinion reveals without any doubt that the evidence and the presumptions and inferences that may properly be drawn from this evidence support the conclusion reached by the jury that respondents were acting pursuant to private conspiratorial plans and that petitioners' claims were acquired pursuant to this conspiracy and not under government direction.

Certainly in reaching its conclusion the Court below did not review the evidence as a whole nor did it allow petitioners the benefit of all that their evidence showed. It is inconsistent for the Court to hold that respondents used one agency, the MRC agency, to further their monopolistic purposes and then to hold that they did not use another agency to eliminate petitioners, especially in view of the lower Court's finding and agreement with the jury that respondents were engaged in an overall conspiracy to

monopolize which specifically intended the exclusion of all competition, petitioners included.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari ought to be granted.

Dated, March 23, 1962.

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(Appendices Follow.)